139-199

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 480. 180

W. C. HOWARD, S. T. STRATTON, AND J. RAUCH,
PLAINTIFFS IN ERROR,

vs.

THE STILLWELL AND BIERCE MANUFACTURING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED OCTOBER 11, 1887.

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1 MONDAY, *January 10th*, 1887.

Be it remembered that there was opened and begun to be holden a regular term of the United States circuit court for the northern district of Texas at the city of Dallas, in Dallas county and said district, on the 10th day of January, A. D. 1887, it being the second Monday in said month in said year and being the day fixed by law for commencing a regular term of said court at said place—present and presiding, the Honorable Andrew P. McCormick, United States district judge for the northern district of Texas; C. B. Pearre, United States attorney for said district; W. L. Cabell, United States marshal for said district, and A. J. Houston, clerk of said court—when and where the following proceedings were had, to wit:

2 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

STILLWELL & BIERCE M'N'F'G CO.
vs.
W. C. HOWARD *et al.* } No. —.

To the honorable court:

The petition of the Stilwell and Beirce Manufacturing Company, a corporation duly corporated, with its principal office and place of business at the city of Dayton, in the State of Ohio, and which is a citizen of said State of Ohio, complaining of W. C. Howard, J. Rauch, and S. T. Stratton, all of whom reside at the county of Dallas, in the State of Texas, and who are citizens of the State of Texas, respectfully represents—

That said defendants are justly indebted to plaintiff in the sum of seven thousand dollars, besides interest, for that, heretofore, to wit, on the 23rd day of March, 1885, the said Howard, Stratton, and Rauch entered into a contract with your petitioner by which your petitioner was to reconstruct the mill belonging to defendants upon the roller system and place in said mill certain machinery and appurtenances mentioned in said contract, a copy of which is hereto attached and marked "Exhibit A."

That in payment for the said work and material so to be furnished said defendants agreed and undertook to pay your petitioner the sum of $17,850.00, as follows: $7,000.00 cash on the shipment of the machinery, and $7,000.00 in nine months after the date of shipment of the said machinery, and $3,850.00 in twelve months from the date of said shipment.

Your petitioner shows that said machinery was shipped on or about the first of June, 1885, and that the defendants paid the $7,000.00 mentioned in said contract; that the work agreed to be done by petitioner was done, performed, and completed by it in a workmanlike manner and according to the terms and conditions of said contract; that the $7,000.00 agreed to be paid nine
3 months from the date of said shipment of said machinery is long past due, and the defendants have refused and failed to

pay same; wherefore plaintiff sues and prays that said defendants be cited to appear and answer this petition, and that it have judgment for its debt, interest, and cost of suit.

(Signed) CRAWFORD & CRAWFORD,
Att'ys for Plaintiff.

(Endorsed:) No. 931. Stilwell & Bierce M'f'g Co. *vs.* W. C. Howard *et al.* Original petition. Filed April 26, 1886. A. J. Houston, clerk, by Jas. D. Adams, deputy.

United States Circuit Court at Dallas. May Term, 1886.

STILLWELL & BIERCE M'F'G CO. *vs.* W. C. HOWARD *et al.* } No. 931.

And now come the defendants, by their attorneys, and deny all and singular the allegations in the plaintiff's petition contained; and of this they put themselves upon the country; wherefore they pray judgment, etc.

(Signed) LINDSLEY & McCORMICK,
Attorneys for Defendants.

(Endorsed:) No. 931. Stillwell & Bierce M'f'g Co. *vs.* W. C. Howard *et al.* Defendants' original answer. Filed May 20, 1886. A. J. Houston, clerk, by Jas. D. Adams, deputy.

In U. S. Circuit Court at Dallas, Texas. January Term, 1887.

THE STILLWELL & BIERCE M'F'G CO. *vs.* W. C. HOWARD *et al.*

And now come the defendants, by their attorneys, and file this as their plea in reconvention to the suit brought by plaintiff against defendants; and these defendants allege that on, to wit, March 23, 1885, the plaintiff entered into a contract with the defendants under the terms of which the plaintiff undertook, promised, and
4 agreed to construct the mill of defendants at Dallas, Texas, upon the roller system, placing therein certain machinery described in said contract and agreeing to place therein all other machinery and material necessary to erect and complete a flour mill of 200 barrels capacity in 24 hours, according to plans to be made by plaintiff, the defendants agreeing to furnish proper motive power to drive said machinery and to build all stone or brick foundations for machinery and frame all openings in floors, all of which work defendants duly performed. The plaintiff contracted to have said mill complete and ready to run on or before July 15th, 1885, provided defendants should have the mill-house ready for plaintiff's workmen by June 1, 1885.

In said contract plaintiff further agreed and undertook with and to defendants and guaranteed to defendants that said mill when

completed should have a capacity for from 200 or more barrels of flour in 24 hours, and that its results should be equal to those of any of the roller or other modern systems of milling now in use in this country using the same grade of wheat; also that plaintiff should perform all the mill-work on said mill in a good and workmanlike manner and should furnish all materials therefor. In consideration of the matters agreed to be done by plaintiff the defendants agreed to pay the plaintiff therefor, all as set forth in said contract.

And now defendants allege that the plaintiff did not have said mill completed and ready to run on or before July 15th, 1885, although defendants did have said mill-house ready by June 1, 1885, for plaintiff to do and perform its part of said work.

And defendants further allege that the said mill when completed did not give equal results to those of any of the roller or other modern systems of milling now or then in use in this country; that plaintiff did not perform all the mill-work on said mill in a good and workmanlike manner and did not furnish all materials therefor as it had contracted so to do; on the contrary, defendants say that plaintiff, for a long time after July 15th, 1885, or a long time after plaintiff began work on said mills, *it* delayed the completion of said mill, and that said delay was the result of the negligence, want of care and skill and attention of plaintiff; that plaintiff did not employ a sufficient number of men to do said work; that the work done was not done in a good and workmanlike manner, but was carelessly, negligently, and badly done and left by plaintiff in an incomplete, bad condition; that much labor and time and money had to be expended by defendants on said mill, after plaintiff discharged its workmen, to rectify the errors in its construction made by plaintiff and to supply articles of needed machinery plaintiff had contracted but failed to deliver and place therein; that defendants had laid in large supplies of good wheat to grind in said mills and had paid large sums of money therefor, and had to hold said wheat for a long time before said mills were ready to run properly, and had to pay large sums of money for storage fees, insurance on said wheat, and interest on money paid for same; that defendants had to purchase at their own expense 2 Johnathan Mills flour-dressers, at a cost of $500.00; automatic feeders, at a cost of $170.00; new set of rolls, at a cost of $500.00. Defendants had to exchange with plaintiff breaks or rollers, for which plaintiffs charge defendants a difference of $36.00, and defendants also paid freight on same, $15.00. Defendants also purchased a Schwizwoelder scorer for $275, & paid freight on same, $15.00. Defendants also had to employ a millwright for ninety days, at a cost of $3.75 per day, to rectify the mistakes and errors of plaintiff; that all of these said expenditures by defendants were covered by their contract with plaintiff, and should have been furnished and performed by plaintiff; that there was a ready cash market in Dallas all this time for flour of the grade said mill would have furnished if made by plaintiff as it had contracted, and defendants could have sold all of said flour it could have made during said

delay, *and that plaintiff* to wit, 200 barrels a day, and that plaintiff,
for the facts above stated, delayed defendants in the manu-
6 facture of said flour for 60 days, by which defendants lost a
profit of $1.00 a barrel on 12,000 barrels of flour, or the sum of $12,000.00.

By reason of all of which defendants say that they have suffered damage and that plaintiff justly owes them the sum of twenty thousand dollars; defendants therefore pray for a judgment in their favor against the plaintiff for the said sum of money above set forth; that defendants be allowed to file and plead this in reconvention to plaintiff's suit, and for general relief.

(Signed) LIDSLEY & McCORMICK,
Att'ys for Def'ts.

2nd. And now further come the defendants, by their attorneys, and file this also as their plea in reconvention to the suit brought by the plaintiff against them; and these defendants allege they are and at the dates hereinafter stated were engaged in the milling business at Dallas, Texas, and that plaintiff is now and at the dates hereinafter stated was engaged in the business of manufacturers and dealers in milling machinery at Dayton, Ohio.

And defendants allege that during the month of March, 1885, the plaintiff entered into a contract with defendants, under the terms of which the plaintiff undertook, promised, and agreed to construct the mill of defendants at Dallas, Texas, upon the roller system, agreeing to place therein all the machinery necessary to erect and complete a flour mill of 200 barrels capacity in twenty-four hours, the defendants to do certain work on their part to said mill, which defendants aver they performed. Plaintiff further contracted with defendants the results of said mill should be satisfactory in all respects; that it would perform all of said work in a good and workmanlike manner and should furnish all the necessary machinery therefor, and that it would build, erect, and complete said mill-work on said mill in a reasonable time and without any unnecessary delay; that plaintiff well knew the purposes of defendants in contracting for said machinery was to run the milling business
7 at Dallas, Texas. The defendants agreed to pay the plaintiff the reasonable value of said work and machinery.

And now defendants allege the plaintiff did — furnish said machinery and perform said labor in a reasonable time nor in a good and workmanlike manner, nor furnish defendants all the machinery it had contracted to furnish. On the contrary, defendants allege the plaintiff, for a long time after it began work on said mill, carelessly, negligently, and willfully delayed the completion of its work; that it did not employ a sufficient number of men to do said work; that its work was done carelessly, negligently, and in an unworkmanlike manner, and was left by plaintiff in an incomplete, bad condition; that much labor and time and money had to be expended by defendants on said mill after plaintiff quit work on it to rectify the errors in its construction made by plaintiff and to supply articles of needed machinery plaintiff had contracted but failed

to furnish and place therein; that defendants had purchased large supplies of good wheat to grind in said mill, relying upon the promise of plaintiff to construct the same as it contracted to do and in a reasonable time, and had paid large sums of money therefor, and had, in consequence of plaintiff's failure to perform its contracts, to hold said wheat for a long time before said mill was ready and complete to grind said grain, and had to pay out large sums of money for storage fees, insurance on said wheat, and interest on money paid for same; that defendants had to purchase at their own expense 2 Jonathan Mills flour-dressers, at a cost of $500.00; automatic feeders, at a cost of $170.00; new set of rolls, at a cost of $500.00. Defendants were compelled to exchange with plaintiff breaks or rollers, for which plaintiff charged defendants a difference of $36.00, and defendants also paid freight on same, $15.00. Defendants also purchased a Schworzwoelder scorer for $275.00, and paid freight on same, $15.00. Defendants also had to employ a millwright for ninety days, at a cost of $3.75 per day, to rectify the mistakes and errors of plaintiff; that all of these said expenditures by defendants were in fact covered by their contract with
8 plaintiff, and should have been furnished and performed by plaintiff, and defendants were compelled to buy said machinery & perform said labor to make said mill manufacture good, salable, and merchantable flour, which the plaintiff had expressly contracted with defendants said mill should do; that there was a ready cash market in Dallas all this time for the grade said mill would have made if constructed as plaintiff had agreed it should be, and defendants could have sold all of said flour it could have made during said unnecessary delays caused by plaintiff, viz., 200 barrels per day, and that plaintiff, by reason of the facts above stated, delayed defendants in the manufacture of said flour for sixty days, by which defendants lost a profit of $1.00 per barrel on 12,000 barrels of flour, or the sum of $12,000.00. By reason of all of which defendants say the plaintiff justly owes them the sum of twenty thousand dollars. Defendants therefore pray for a judgment in their favor against the plaintiff for the said sum of money above set forth; that defendants be allowed to file this in reconvention to plaintiff's suit.

(Signed) LINDSLEY & McCORMICK,
Att'ys for Defendants.

(Endorsed:) No. 931. Stillwell & Bierce M'f'g Co. *vs.* W. C. Howard *et al.* Defendants' plea in reconvention. Filed Jan'y 7, 1887. A. J. Houston, clerk, by Jas. D. Adams, deputy.

STILWELL AND BIERCE M'F'G CO.
vs.
W. C. HOWARD *et al.* } 931.

This day, upon application of plaintiff, it is hereby granted leave to amend in this cause.

Copy.

Form No. 3.

This form to be used where the Stillwell & Bierce Manufacturing Co. furnishes all machines, &c., and does the millwright work. Fill up three of these blanks; one for the purchaser, one for Stilwell & Bierce Manufacturing Co., and one for the salesman. Fill up blanks carefully. This contract to be binding only when approved by the Stilwell & Bierce Manufacturing Co. at its home office, at Dayton, Ohio. All settlements must be made with and all notes given and money paid direct to the Stilwell & Bierce Manufacturing Co. or on their written order.

"EXHIBIT A."

This agreement between the Stilwell & Bierce Manufacturing Co., of Dayton, Ohio, of the first part, and W. C. Howard, J. Rauch, and S. T. Stratton, of Dallas, Tex., of second part, witnesseth: That the party of the first part hereby covenants and agrees with the said party of the second part to reconstruct the mill of said party of the second part upon the roller system, placing therein the following machines:

Seven (7) 9″ x 24″ Odell double roller mill.
One (1) 9″ x 30″ " " " "
Fourteen (14) bolting reeds 16″ x 32″.
Eight (8) scalping " 7 x 30″.
Four (4) No. 3 C. N. Smith centrifugal reels.
Four (4) No. 1 Geo. T. Smith purifiers, with aspirators.
Three (3) No. 0 " " " " "
One (1) double middlings aspirator.
One (1) No. — Wm. Richmond horizontal bran duster.
Three (1) flour packers; one brand packer.
Two (2) " " scales; one (1) wheat heater.
Three (3) No. 4 Prinz dust collectors, with fan attachments.
One (1) No. 2 Wm. Richmond wheat separator.
One (1) " 4 smut machine and separator.
One (1) 4 " adjustable brush machine.
One (1) No. 1 Kurth double cylinder brush machine, and all other machinery and material necessary to erect and complete a flour mill of 200 bbls. capacity in 24 hours, according to plans to be made by the party of the first part and to be placed by them in the mill-house to be built by the party of the second part in Dallas, Texas; party of the second part to furnish proper motive power to drive said machinery and to extend engine shaft into basement of mill-house to a point to be hereafter designated by party of first part and not to exceed eight feet inside of basement wall. Party of the second part are to build all stone or brick foundations for machinery and frame all openings in floor for packers, upright shafts, &c. The party of the first part agrees to have the mill completed and ready to run on or before July 15th, 1885, provided party of the second part shall have mill-house ready by June 1st, 1885. The

said party of the first part guarantees that said mill when completed shall have a capacity for from 200 or more barrels of flour in twenty-four hours, and that the results shall be equal to those of any of the roller or other modern systems of milling now in use in this country using the same grades of wheat. The said party of the first part shall perform all the millwright work, — shall be done in a good and workmanlike manner, and shall furnish all materials therefor, except such as are now in said mill and can — utilized, which may be used free of charge by said party of the first part; and the said party of the second part hereby covenants and agrees to pay the said party of the first part for said machinery, materials, and labor the sum of seventeen thousand eight hundred & fifty dollars, as follows; $7,000 cash on shipment of said machines and $7,000 in nine months from date of shipment of said m'ch'y; $3,850 in twelve months from date of shipment of said machinery. Party of the second part to keep the mill insured for the benefit of party of the first part as their interest may appear in case of fire, for which said party of the second part agrees to execute and deliver promissory notes to said party of the first part, dated time of shipment of m'ch'y, bearing 8 per cent. interest and secured as follows: To be satisfactory to the parties of the first part. No claims for damages shall be made by said party of the second part on account of delays incident to starting up. The said party of the second part agrees to be responsible for any damage or loss by fire or otherwise after the machinery reaches Dallas. The title of said machinery shall remain in and not pass from said party of the first part until the same are paid for and until all the notes, whether secured or unsecured, given therefor are fully paid, and in default of payment, as above agreed, said party of the first part or its agent may
11 take possession of and remove said machines without legal process.

Should second party desire to furnish any of the iron-work or other material or a portion of the labor it can be so stated here, and if said party of the first part is to assume any responsibility in connection with the motive power for driving said mill it must so appear in the body of the contract.

(Signed) STILWELL & BIERCE M'F'G Co.,
Per J. W. McKEEN, *Agent.*

This 23 day of March, 1885.

(Signed) W. C. HOWARD.
" S. T. STRATTON.
" J. RAUCH.

P. O. address: —— ——, county of ——, State of ——. Shipping address: —— ——, county of ——, State of ——.

Note this: The within order will be filled by machinery of our own manufacture, so far as the line we are making at the time goes. Should any machines be ordered not made by us such machines as we are handling of the kind will be furnished, unless otherwise specified in the order.

Please fill in the answers to the following questions:
Will your middlings be reduced on burrs or rolls?
Have you steam or water power?
What is the speed of your power shaft?
How many horse power have you?
What is the size and kind of your mill building?
How many stories high?
What is the height of each story in the clear?
What is the number, length, and diameter of your reels?
Have they single or double conveyors?
How many grades of flour do you wish to make?
State the character of your wheat. Is it hard or soft, winter or spring?
What machinery have you now in the mill?

In the Circuit Court of the United States for the Northern
12 District of Texas, at Dallas.

STILWELL & BIERCE MAN'F'G CO.
vs.
W. C. HOWARD *et al.* } No. 931.

To the honorable court:

Now comes plaintiff in the above-entitled cause and, by leave of the court first had and obtained, files this its first amended original petition, amending the original petition filed April 26th, 1886, that the same may read as follows:

The petition of the Stilwell & Bierce Manufacturing Co., a corporation duly incorporated, with its principal office and place of business at the city of Dayton, in the State of Ohio, and which is a citizen of the State of Ohio, complaining of W. C. Howard, J. Rauch, and S. T. Straton, all of whom reside at the county of Dallas, in the State of Texas, and who are citizens of said State of Texas, respectfully represents—

That defendants are justly indebted to plaintiff in the sum of $10,850.00, besides interest, for that heretofore, to wit, on the 23rd day of March, 1885, said W. C. Howard, J. Rauch, and S. T. Stratton made and entered into a contract with your petitioners, by which your petitioners were to reconstruct the mill belonging to defendants upon the roller system and place in said mill certain machinery and appurtenances mentioned in said contract, a copy of which is hereto attached, marked Exhibit A, and made a part of this petition; that in payment for the work and material so to be furnished said defendants agreed and undertook to pay your petitioners the sum of $17,850.00, as follows: $7,000 cash on the shipment of said machinery, and $7,000 in nine months after the date of the shipment of said machinery, and $3,850 in 12 months from the date of said shipment.

Your petitioners show that said machinery was shipped on, to wit, the 26th day of May, 1885, and that the said defendants paid the $7,000 mentioned in said contract; that the work agreed to be

done by your petitioners was done, performed, and completed in a workmanlike manner, and that defendants accepted and are using the same; that said sum of $7,000 agreed to be paid nine
13 months after the date of said shipment of machinery and the said sum of $3,850 agreed to be paid in 12 months after the date of said shipment are long since due and the defendants have refused and failed to pay same. Plaintiff says that for the said sums of $7,000 and $3,850 the said defendants agreed in the terms of said contract to execute and deliver their promissory notes to said plaintiff, dated at the time of the shipment of said machinery, and to bear 8 per cent. interest and to be secured to the satisfaction of said plaintiff. Plaintiff says that the defendants have refused to execute said notes as provided for in said contract, and that said sums are long since due and unpaid; wherefore plaintiff sues and prays that said defendants be cited to appear and answer this petition; that they have judgment for their debt and interest at the rate of 8 per cent. from the said 26th day of May, 1885, and for costs and general relief.

(Signed) CRAWFORD & CRAWFORD,
Att'ys for Plaintiff.

(Endorsed:) No. 931. Stilwell & Bierce M'f'g Co. *vs.* W. C. Howard *et al.* Plaintiff's 1st amended original petition. Filed Jan'y 31, 1887. A. J. Houston, clerk.

Circuit Court of the United States for the Northern District of Texas, at Dallas. Jan'y Term, 1887.

STILLWELL & BIERCE M'F'G CO. *vs.* W. C. HOWARD *et al.* } No. 931.

Now come the defendants, by their attorneys, and, leave obtained, file this as their first amended original answer to their original answer, No. 931, filed May 20th, 1886.

And defendants demur to plaintiff's petition, and say the same is insufficient in law; wherefore, &c.

(Signed) LINDSLEY & McCORMICK,
Att'ys for Defendants.

And, answering, defendants deny all and singular the allegations in plaintiff's petition contained, and of this they put themselves upon the country; wherefore, &c.

14 (Signed) LINDSLEY & McCORMICK,
Att'ys for D'f'ts.

In U. S. Circuit Court, at Dallas, Texas. Jan'y Term, 1887.

THE STILLWELL & BIERCE M'F'G CO. *vs.* W. C. HOWARD *et al.* }

And now come the defendants, by their attorneys, and file this as

their plea in reconvention to the suit brought by plaintiff against defendants; and these defendants allege on, to wit, March 23, 1885, the plaintiff entered into a contract with the defendants, under the terms of which the plaintiff undertook, promised, and agreed to construct the mill of defendants at Dallas, Texas, upon the roller system, placing thereon certain machinery described in said contract, and agreeing to place thereon all other machinery and material necessary to erect and complete a flour mill of 200 barrels' capacity in 24 hours, according to plan to be made by plaintiff, the defendants agreeing to furnish proper motive power to drive said machinery and to build all stone and brick foundations for machinery and to frame all openings in floor, all of which work defendants duly performed. The plaintiff contracted to have said mill complete and ready to run on or before July 15th, 1885, provided defendants should have the mill-house ready for plaintiff's workmen by June 1st, 1885.

In said contract plaintiff further agreed and undertook with and to defendants that said mill when completed should have a capacity for from 200 or more barrels of flour in 24 hours, and that its results should be equal to those of any of the roller or other modern systems of milling now in use in this country, using the same grade of wheat; also that the plaintiff should perform all the mill-work on said mill in a good and workmanlike manner and should furnish all material therefor. In consideration of the matters agreed to be done by plaintiff the defendants agreed to pay the plaintiff therefor, all as set forth in said contract.

And now defendants allege that the plaintiff did not have said mill completed and ready to run on or before July 15th, 1885, although defendants did have said mill-house ready by June 1st, 1885, for plaintiff to do and perform its part of said work.

And defendants further allege that the said mill when completed did not give results equal to those of any of the roller or other modern systems of milling now or then in use in this country; that plaintiff did not perform all the mill-work on said mill in a good and workmanlike manner, and did not furnish all materials therefor as it had contracted so to do. On the contrary, defendants say that plaintiff for a long time after July 15th, 1885, and for a long time after plaintiff began work on said mill, *it* delayed the completion of said mill, and that said delay was the result of the negligence, want of care and skill and attention of plaintiff; that plaintiff did not employ sufficient number of men to do said work; that the work done was not done in a good and workmanlike manner, but carelessly, negligently, and badly done and left by plaintiff in an incomplete, bad condition; that much labor and time and money had to be expended by defendants on said mill after plaintiff discharged its workmen to rectify the errors in its construction made by plaintiff and to supply articles of needed machinery plaintiff had contracted but failed to deliver and place thereon; that defendants had laid in large supplies of good wheat to grind in said mills and had paid large sums of money therefor,

and had to hold said wheat for a long time before said mills were ready to run properly, and had to pay large sums of money for storage fees, insurance on said wheat, and interest on money paid for same; that defendants had to purchase at their own expense 2 Jonathan Mills flour-dressers, at a cost of $500.00; automatic feeders, at a cost of $170.00; new set of rollers, at a cost of $500.00. Defendants had to exchange with plaintiff breaks or rollers, for which plaintiff charged defendants a difference of $36.00, and defendants also paid freight on same, $15.00. Defendants also purchased a Schwarzwaelder scorer for $275.00 & paid freight on same, $15.00. Defendants also had to employ a millwright at a cost of $3.75 per day for ninety days to rectify the mistakes and errors of plaintiff; that all of these said expenditures by defendants
16 were covered by their contract with plaintiff, and should have been furnished and performed by plaintiff; that there was a ready cash market in Dallas all the time for flour of the grade said mills would have furnished if made by plaintiff as it had contracted, and defendants could have sold all of said flour it could have made during said delay, to wit, 200 barrels a day, and that plaintiff, for the facts above stated, delayed defendants in the manufacture of said flour for 60 days, by which defendants lost a profit of $1.00 a barrel on 12,000 barrels of flour, or the sum of $12,000.00. By reason of all of which defendants say they have suffered damage and that plaintiff justly owes them the sum of twenty thousand dollars.

Defendants therefore pray for a judgment in their favor against the plaintiff for the said sum of money above set forth; that defendants be allowed to file and plead this in reconvention to plaintiff's suit, and for general relief.

(Signed) LINDSEY & McCORMICK,
Att'ys for D'f'ts.

2nd. And now further come the defendants, by their attorneys, and file this also as their plea in reconvention to the suit brought by the plaintiff against them; and these defendants allege that they are and at the dates hereinafter stated were engaged in the milling business at Dallas, Texas, and that plaintiff is now and at the dates hereinafter stated was engaged in the business of manufacturers and dealers in milling machinery at Dayton, Ohio.

And defendants allege that during the month of March, 1885, the plaintiff entered into a contract with defendants, under the terms of which the plaintiff undertook, promised, and agreed to construct the mill of defendants at Dallas, Texas, upon the roller system, agreeing to place therein all the machinery necessary to erect and complete a flour mill of 200 barrels capacity in twenty-four hours, the defendants to do certain work on their part to said mill, which defendants aver they performed. Plaintiff further contracted with defendants the results of said mill should be satisfactory in all respects; that it would perform all of said work in a good and
17 workmanlike manner and should furnish all the necessary machinery therefor, and that it would build, erect, and com-

plete said mill-work on said mill in a reasonable time and without any unnecessary delay; that plaintiff well knew the purpose of defendants in contracting for said machinery was to run the milling business at Dallas, Texas. The defendants agreed to pay the plaintiff the reasonable value of said work and machinery.

And now defendants allege the plaintiff did not furnish said machinery and perform said labor in a reasonable time nor in a good and workmanlike manner, nor furnish defendants all of the machinery it had contracted to furnish. On the contrary, defendants allege the plaintiff, for a long time after it began work on said mill, carelessly, negligently, and willfully delayed the completion of its work; that it did not employ a sufficient number of men to do said work; that its work was done carelessly, negligently, and in an unworkmanlike manner, and was left by plaintiff in an incomplete, bad condition; that much labor and time and money had to be expended by defendants on said mill after plaintiff quit work on it to rectify the errors in the construction made by plaintiff and to supply articles of needed machinery plaintiff had contracted but failed to furnish and place therein; that defendants had purchased large supplies of good wheat to grind in said mill, relying upon the promise of plaintiff to construct the same as it contracted to do and in a reasonable time, and had paid large sums of money therefor, and had, in consequence of plaintiff's failure to perform its contract, to hold said wheat for a long time before said mill was ready and complete to grind said grain, and had to pay out large sums of money for storage fees, insurance on said wheat, and interest on money paid for same; that defendants had to purchase at their own expense 2 Jonathan Mills flour-dressers, at a cost of $500.00; automatic feeders, at a cost of $170.00; new set of rolls, at a cost of $500.00. Defendants were compelled to exchange with plaintiff breaks or rollers, for which plaintiff charged defendants a
18 difference of $36.00, and defendants also paid freight on same, $15.00. Defendants also purchased a Schwarzwaelder scorer for $275.00, and paid freight on same, $15.00. Defendants had also to employ a millwright for ninety days, at a cost of $3.75 per day, to rectify the mistakes and errors of plaintiff; that all of these said expenditures by defendants were in fact covered by their contract with plaintiff, and should have been furnished and performed by plaintiff, and defendants were compelled to buy said machinery and perform said labor to make said mill manufacture good, salable, and merchantable flour, which the plaintiff had expressly contracted with defendants said mill should do; that there was a ready cash market in Dallas all this time for the grade said mill would have made if constructed as plaintiff had agreed it should be, and defendants could have sold all of this said flour it could have made during said unnecessary delays caused by plaintiff, viz., 200 barrels per day, and that plaintiff, by reason of the facts above stated, delayed defendants in the manufacture of said flour for sixty days, by which defendants lost a profit of $1.00 per barrel on 12,000 barrels of flour, or the sum of $12,000.00. By reason of all of which defendants say the plaintiff justly owes them the sum of twenty thou-

sand dollars. Defendants therefore pray for a judgment in their favor against plaintiff for the said sum of money above set forth; that defendants be allowed to file and plead this in reconvention to plaintiff's suit.

(Signed) LINDSLEY & McCORMICK,
Att'ys for Defendants.

(Endorsed:) No. 931. Stillwell & Bierce M'f'g Co. *vs.* W. C. Howard *et al.* Defendants' first amended answer and plea in reconvention. Filed Febr'y 8, 1887. A. J. Houston, clerk, by Jas. D. Adams, deputy.

19 United States Circuit Court at Dallas. January Term, 1887.

STILLWELL & BIERCE M'F'G CO.
vs.
W. C. HOWARD *et al.*

Now come the defendants, by their attorneys, and move the court to grant them a continuance in this cause on account of the absence of J. M. West, who is a material witness for the defence and who is not absent with the consent or procurement of defendants. Said witness is beyond the jurisdiction of this court, and his exact whereabouts defendants at this time do not know, but have been informed within past few days he is at Savanah, Geo.

Defendants, before this term of court began, did for a long time make diligent search and enquiry for the residence of said witness by writing letters and sending telegrams and enquiring of parties at Dallas who knew said West personally. Defendants were at last informed said witness resided in Washington city, D. C., and as soon as they learned this, on the 3rd of Jan'y, 1887, they caused notice to be served on plaintiff and a commission to issue to take the deposition of said West at Washington city Jan'y 14th, 1887. On January 5, 1887, defendants caused a telegram to be sent to said West at Washington city to call at the office there of the attorney engaged to take said deposition. Defendants received word through the telegraph office that said West was temporarily absent, but was expected back in about ten days. Defendants thereupon instructed their Washington attorney to hold the commission and take the deposition of said witness the moment he should return to Washington and to have the same forwarded with all possible dispatch to Dallas.

Said West is a material witness for the defendants to show that plaintiff failed to comply with their contract with defendants sued upon in their amended petition filed this term of court and to prove the facts set up in defendants' plea in reconvention to said amended petition. Plaintiff's original petition only sues for $7,000.00,
20 while its amended petition filed this term of court only a few days ago sues for $3,850.00 additional. Said $3,850.00 was not due when plaintiff filed its original petition, nor could it have been sued upon but to this term of court. Said West was the foreman and superintendent of defendants in the building of the mills

at Dallas—that is, of the part the defendants were to build in conjunction with certain parts to be constructed by plaintiff. He was present from day to day and continually while plaintiff was performing their labor upon said mills; that there is no other source from which defendants can obtain testimony of any other person who was so continually present doing all the time plaintiff was engaged in building said mills; that said West will testify as to the number of men employed by plaintiff, as to the character of the work done, the time occupied by plaintiff in doing each part of said work; that plaintiff did not employ a sufficient number of hands to build its part of said mills within a reasonable time; that the work plaintiff did was carelessly and negligently executed; that plaintiff left said mills and its work upon it in an incomplete and imperfect condition, and that Wm. Odell, the superintendent employed by plaintiff to do its part of said work, was intoxicated nearly all the time he was thus engaged, and that he brought to said mills kegs of beer for his workmen to drink there and would carouse with them while said work was going on.

That since this case was called for trial defendants have learned said West is now at Savannah Georgia, and defendants expect to get his testimony by the next term of this court.

This application is not made for delay, but that justice may be done.

S. T. Stratton, being duly sworn, says he is one of the *plaintiffs* in the above cause; that the facts above stated are true.

Febr'y 8, '87.

(Signed) S. T. STRATTON.

Sworn to and subscribed before me this Febr'y 8, '87.

(Signed) A. J. HOUSTON,
Clerk U. S. Cir. Court, Dallas,
By JAS. D. ADAMS, *Deputy.*

21 STILWELL & BIERCE M'F'G Co. *vs.* W. C. HOWARD *et al.* } 931.

This day came the parties, by their attorneys, and then came on to be heard the defendants' motion for a continuance of this cause herein, and the argument of counsel thereon being heard and fully understood it is the opinion of the court that the law is for the plaintiff upon said motion; it is therefore ordered by the court that said motion be, and the same is hereby, overruled.

In U. S. Circuit Court for the Northern District of Texas, at Dallas

STILWELL & BIERCE M'F'G Co. *vs.* W. C. HOWARD *et al.* } No. 931.

Now comes plaintiff and specially excepts to so much of defendants' answer as seeks to recover the sum of one dollar per barrel on

twelve thousand barrels of flour, which defendants allege would have been their profit could the flour have been manufactured, and plaintiff moves the court to strike out the same.

(Signed) CRAWFORD & CRAWFORD,
Att'ys for Plaintiff.

(Endorsed:) No. 931. Stilwell & Bierce M'f'g Co. *vs.* W. C. Howard *et al.* Motion to strike out. Filed Febr'y 8, 1887. A. J. Houston, clerk, by Jas. D. Adams, deputy.

U. S. Cir. C't, N. D. of Tex., at Dallas. January Term, 1887.

STILLWELL & BIERCE M'F'G CO.
vs.
W. C. HOWARD *et al.* } No. 931.

Now come def'ts and move the court to suppress the deposition of Wm. Odell, now on file in this cause, for the following reasons, viz:

1st. Because said deposition is not certified to by the officer who took the same as required by law regulating the taking of depositions *de bene esse.*

2nd. Because no reasonable notice of the time and place
22 of taking said deposition was given the defendants as required by law regulating the taking of depositions *de bene esse.*

3rd. Because said deposition was not taken under authority of any *dedimus posertatem* granted by any court of the United States according to common usage.

(Signed) LINDSLEY & McCORMICK,
Att'ys for Defendants.

(Endorsed:) No. 931. Stillwell & Bierce M'f'g Co. *vs.* W. C. Howard *et al.* Motion to suppress deposition of Wm. Odell. Filed Febr'y 8, 1887. A. J. Houston, clerk, by Jas. D. Adams, deputy.

STILLWELL & BIERCE M'F'G CO.
vs.
W. C. HOWARD *et al.*

Defendants now offer to prove by W. C. Howard, J. Rauch, and S. T. Stratton that the market price per barrel for flour of the grade the contract sued upon stipulated for, between the date of middle of July, 1885, and middle of Sept., 1885, was $5.00 per barrel; that during that period there was a ready cash market value in Texas for said grade of flour at $5 to $5.50 per barrel, and that defendants could have sold 200 barrels per day during said period at $5.00 per barrel, and that upon each barrel so sold they would have realized $1.00 per barrel profit; that defendants had purchased and held on storage during said period a sufficient quantity of good wheat to have manufactured 200 barrels per day during said sixty days; that the market price during said period of such wheat was 60 to 70 per bushel, and the expense of turning such wheat into flour during said period was 80c. per barrel, and that defendants had in

their employ all necessary laborers and skilled workmen to manufacture said wheat into flour and was fully equipped with fuel and water and everything necessary to convert said wheat into flour, save and except the parts and pieces of said mill which pl'ff contracted to furnish in the contract sued on; all of which above
23 testimony is offered in support of that portion of defendants' plea in reconvention which seeks to recover the profits on 12,000 bbls. of flour.

(Endorsed:) No. 931. Stillwell & Bierce M'f'g Co. *vs.* W. C. Howard *et al.* No. 4. Offer of def'ts to introduce testimony or plea in reconvention. Filed Febr'y 8, 1887. A. J. Houston, clerk, by Jas. D. Adams, deputy.

Deposition Envelope.

Case No. 931. United States circuit court N. D. Texas, at Dallas. Stilwell & Bierce M'f'g Co. *vs.* W. C. Howard *et al.* Deposition of William Odell, plaintiff's witness.

Received this package on the 18 day of Jan., 1887, from Z. L. Davis, notary public, and forwarded the same the 18 day of Jan., 1887, by due course of mail, as directed.

(Signed) D. T. HUNT,
Postmaster at Rochester, N. Y.
By W. S. WHITTLERLY,
Deputy Postmaster at —.

Received this package from the post office at Dallas, Texas, on the 22nd day of January, 1887.

(Signed) A. J. HOUSTON, *Clerk*,
By JAS. D. ADAMS, *Deputy.*

Filed January 22d, 1887.

(Signed) A. J. HOUSTON, *Clerk*,
By JAS. D. ADAMS, *Deputy.*

This package is opened on this the 5th day of Febr'y, 1887, at the request of M. L. Crawford, Esq., an attorney for the plaintiff.

(Signed) A. J. HOUSTON, *Clerk*,
By JAS. D. ADAMS, *Deputy.*

24 United States Circuit Court, Fifth Circuit and Northern District of Texas, at Dallas.

The President of the United States of America to any clerk of a court of record having a seal, any notary public, or any commissioner of deeds, duly appointed under the laws of the State of Texas, within the State of New York, Greeting:

Know ye that we, in confidence of your prudence and fidelity, have appointed you or either of you and by these presents do give you full power and authority diligently to examine William Odell, of Rochester, Monroe county, New York, upon certain interrogato-

ries propounded to him in a case wherein Stilwell and Bierce M'f'g Company are plaintiffs and W. C. Howard *et al.* are defendants, which said cause is now pending in the circuit court of the United States for the fifth circuit and northern district of Texas, *fifth circuit*, and therefore we command that you, at certain days to be appointed by you for that purpose, cause the said witness to come before you, and then and there examine him upon said interrogatories and any cross-interrogatories (originals whereof are hereto annexed) on his corporal oath first taken before you upon the Holy Evangelist, or in such other solemn manner as is and may be authorized by law, and that you take the answers of the witness to such interrogatories and reduce the same to writing, which shall be signed and sworn to by the said witness, and you shall certify under your hand and seal that the same was signed and sworn to by said witness before you, and shall seal them up in an envelope, with interrogatories and this commission, with your name written across the seal, and indorse on the envelope the names of the parties to the suit and the name of the witness and direct the package to the "clerk of the circuit court of the United States for the northern district of Texas, Dallas, Texas." If sent by mail the postmaster or his deputy mailing the same shall indorse thereon that he received them from the hands of the officer before whom the answers to said interrogatories were taken.

25 Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court thereof, at Dallas, in said district, this 4th day
[SEAL.] of January, in the year of our Lord eighteen hundred and eighty-seven, and of American Independence the 111th year.

(Signed) A. J. HOUSTON,
Clerk of said Court.

NOTE.—The officer who executes this writ is respectfully requested to endorse on the reverse side an itemized statement of hts own and any witness or other fees incurred, crediting any payment made thereon.

HOUSTON, *Clerk.*

(Endorsed:) No. 931. U. S. circuit court, northern district of Texas, at Dallas. Stilwell & Bierce M'f'g Company *vs.* W. C. Howard *et al.* Issued 4th day of January, A. D. 1887. Houston, clerk. Commission to take the testimony of William Odell, witness for plaintiffs. Opened and filed 5th day of Febr'y, A. D. 1887. (Signed) A. J. Houston, clerk, by Jas. D. Adams, deputy.

ROCHESTER, N. Y., *January* 18, 1887.

Notary fees executing this commission	$5 00
Postage	12
Witness fees, Wm. Odell, 1 day's attendance	2 00
	$7 12

(Signed) Z. L. DAVIS,
Notary Public, Rochester, N. Y.

26 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

STILLWELL & BIERCE MAN'F'G CO. *vs.* W. C. HOWARD *et al.* } No. 931.

To the defendants in the above-entitled cause or to Messrs. Lindsley & McCormick, their attorneys of record:

Take notice that five days after the service hereof we shall apply to the clerk of the United States circuit court in and for the northern district of Texas, at Dallas, for a commission to take the answers of William Odell, who resides in the city of Rochester, in the county of Monroe, in the State of New York, to the accompanying interrogatories. The answers of said witness will be read in evidence on behalf of the plaintiff upon the trial of this cause.

(Signed) CRAWFORD & CRAWFORD,
Att'ys for Plaintiff.

Int'g. 1. State your age and place of residence and your occupation.

Int'g. 2. This is a suit instituted by the Stilwell & Bierce M'f'g Co. against W. C. Howard, J. Rauch, and S. T. Stratton, all of Dallas county, to recover a balance due upon a contract entered into between the Stilwell & Bierce M'f'g Co. and said Howard, Rauch, and Stratton about March, 1885, for the reconstruction of a mill in the city of Dallas, Texas, by placing certain machinery therein. State whether you are acquainted with the parties of this suit or either of them and how long you have known them.

Int'g. 3. In whose employ was you about June, 1885, and for what purpose were you employed and where was said employment had? If in answer you state that you were employed by the Stilwell & Bierce M'f'g Co. to superintend the putting in of machinery into the mill of defendants at Dallas, state when you left Dayton and how many men, if any, you brought with you and what time —

27 reached Dallas.

Int'g. 4. State whether or not the building into which this machinery was to be placed was completed at the time you reached Dallas with your men; and, if not, state how much was incomplete and how near the building was ready for the machinery. State fully in answer to this.

Int'g. 5. If you say that the building was not ready for the machinery, then state whether or not you were delayed with your men before you could commence work; and, if yea, how long were you so delayed. Where was the machinery when you reached Dallas?

Int'g. 6. State when the house was complete and ready for the machinery, and if you encountered any obstacles or delays in putting in the machinery by reason of the non-completion of the building state fully how long you were delayed and the occasion for it.

Int'g. 7. State whether or not after the said building was ready there was any delays in putting in said machinery. State the

manner in which you proceeded to work with reference particularly to the diligence used by you and the men who came with you or who were afterwards employed by you in putting in said machinery and completing said contract. State whether there was any unreasonable or unavoidable delay upon your part or the men engaged with you after the building was ready for the machinery.

Int'g. 8. Can you say when the machinery was unloaded at the house?

Int'g. 9. State when the work of putting in the machinery was completed.

(Signed) CRAWFORD & CRAWFORD,
Att'ys for Plaintiffs.

(Endorsed:) No. 931. Stilwell & Bierce M'f'g Co. *vs.* W. C. Howard *et al.* Interrogatories to Wm. Odell, a witness for the plaintiff. We waive copy of interrogatories and consent that commission may issue upon the original, direct, and cross interrogatories. (Signed) Lindsley & McCormick, att'ys for def'ts.

28 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

STILLWELL & BIERCE M'F'G CO. *vs.* W. C. HOWARD *et al.* } No. 931.

Cross-interrogatories filed by the defendants to the interrogatories-in-chief filed by plaintiff, addressed to the witness, William Odell.

Cross-interrogatory first. Where do now you reside, how long have you resided there, and what has been your occupation since you left Dallas, Texas?

(Signed) LINDSLEY & McCORMICK,
Att'ys for D'f'ts.

(Endorsed:) No. 931. Stillwell & Bierce M'f'g Co. *vs.* W. C. Howard *et al.* Cross-interrogatories filed by defendants.

Deposition of William Odell, named in the hereto-annexed commission, in answer to the interrogatories and cross-interrogatories thereto annexed, taken before me, Z. L. Davis, a notary public in and for the county of Monroe and State of New York, at my office, in the city of Rochester, in said county, on the 18th day of January, 1887.

The said William Odell, being by me first duly sworn in said action, as required in said commission, doth depose and say, in answer to the 1st direct interrogatory, as follows:

Answer. I am thirty-seven years old. I have no permanent home. I reside at present at Rochester, N. Y. I am a millwright by occupation.

In answer to the second interrogatory he says: I know all the plaintiffs; also all the defendants. I have known the plaintiffs five or six years and the defendants since June, 1885.

In answer to the third interrogatory he says: In June, 1885, I was in the employ of the said Stillwell and Bierce Manufacturing Company to superintend the putting of the machinery into
29 the mill of the defendants at Dallas, Texas. I left Dayton, Ohio, May 28th, 1885, and I arrived in Dallas, Texas, June 1st, 1885. I brought four men with me from Dayton.

In answer to interrogatory 4th he says: The building was not completed when I reached Dallas. The defendants were putting in the joist of the second story. One story and an attic were added after our arrival. For one whole week all my men and myself were idle because of the incomplete state of the building. After one week after our arrival I put two men at work in a storage room over the engine-room and my other two men went to work for the defendants in their elevator.

In answer to the fifth interrogatory he says: We were delayed, as stated in my last answer. The machinery left Dayton before we did and was on the road when we reached Dallas.

In answer to the sixth interrogatory he says: The mill-house was not complete until about the middle of July, 1885. It was not ready for the machinery before June 20th, 1885. After I had begun I was delayed by the defendants laying the floor and whitewashing the building. Myself and my men were delayed three or four days in all on this account. I did not, on account of the unfinished state of the building, put on a full crew until June 29th, 1885.

In answer to the seventh interrogatory he saith: As soon as the state of the building would permit me to do so I put on all the force I could use and continued the work with all the diligence that possibly could be used until the work was complete. There was no delay on my part or of my men whatever. The work was progressed and pushed as fast as it was possible to do.

In answer to the eighth interrogatory he saith: I began unloading the machinery June 20th, 1885, and finished unloading about 10 days after that time.

30 In answer to the ninth interrogatory he saith: It was completed August 26, 1885.

(Signed) WILLIAM ODELL.

In answer to the first cross-interrogatory he saith: I now reside in Rochester, N. Y. I have resided here since August 10th, 1886. Since I left Dallas, Texas, my occupation has been millwrighting.

(Signed) WILLIAM ODELL.

STATE OF NEW YORK, }
Monroe County. }

I, Zinion L. Davis, a notary public duly appointed and qualified within & for the county & State aforesaid, do hereby certify that, at my office, in the city of Rochester, N. Y., in said county, on the 18th day of January, 1887, I caused the within-named witness, William Odell, to come before me, and after his being duly sworn as a witness in said action I proceeded to take his answers to said interrogatories and cross-interrogatory; that after giving the same

the same were signed by him in my presence and sworn to by said William Odell before me, as required by said commission.

Given under my hand and seal of office, at Rochester, [SEAL.] Monroe county and State of New York, this 18th day of January, A. D. 1887.

(Signed) Z. L. DAVIS,
Notary Public, Monroe County, New York.

(Endorsed:) Opened & filed Febr'y 5, 1887. A. J. Houston, clerk, by Jas. D. Adams, deputy.

31 In the United States Circuit Court for the Northern District of Texas, at Dallas.

Verdict of the Jury in the Case of The Stillwell & Bierce M'f'g Co. vs. W. C. Howard et al.

We, the jury, find for the plaintiff as follows, to wit:

Ten thousand eight hundred and fifty dollars, amount due on contract for machinery, etc., for mill; also the sum of fourteen hundred and eighty-two $\frac{82}{100}$ dollars, interest.

Amount due on contract	$10,850 00
Interest from May 26th, 1885, to Feb'y 9th, 1887, at 8 %	1,482 82
Total	$12,332 82

And we find for the defendants the sum of eight hundred and seventy-five dollars as damages.

(Signed) J. W. MOORE, *Foreman.*

(Endorsed:) No. 931. Verdict. Filed Feb'y 10, 1887. A. J. Houston, clerk.

STILLWELL AND BIERCE M'F'G CO. *vs.* W. C. HOWARD *et al.* } 931.

This day came the parties, by their attorneys, and then came on to — heard the plaintiff's exception to the defendants' plea in reconvention, and, the argument of counsel thereon being heard, it is the opinion of the court that the law is for the plaintiff.

It is therefore considered by the court that the said exception be sustained, and thereupon both the parties announce themselves ready for trial, and thereupon came a jury of good and lawful men, to wit, J. M. Brown, J. S. Guice, J. S. Helm, R. Horton, C. C. Justice, R. C. Kimbrough, C. Kimball, J. W. Moore, Thos. McIlvane, Frank Stewart, H. C. Tilson, and Rob't Wright, who, being sworn as the law directs to try the cause, and after having heard the pleadings of the parties, the testimony of the witnesses, and the argument of counsel, received the charge of the court and retired to consider their verdict, and afterwards returned into open court the following verdict, to wit:

32 "We, the jury, find for the plaintiff as follows, to wit: Ten thousand eight hundred and fifty dollars, amount due on contract, due on machinery, etc., for mill; also the sum of fourteen hundred and eighty-two $\frac{82}{100}$ dollars interest.

Amount due on contract	$10,850 00
Interest from May 26, 1885, to Feb'y 9, 1887, at 8 %	1,482 82
Total	$12,332 82

And we find for the defendants the sum of eight hundred and seventy-five dollars as damages.

(Signed) J. W. MOORE, *Foreman.*"

It is therefore considered and adjudged and decreed by the court that the plaintiff, Stillwell — Bierce M'f'g Company, a private corporation, do have and recover of the defendants, W. C. Howard, J. Rauch, and S. T. Stratton, the sum of eleven thousand four hundred and fifty-seven dollars and eighty-two cents, interest thereon from this date, and all costs of suit, for which let execution issue.

United States Circuit Court for the Northern District of Texas, at Dallas, Texas. January Term, 1887.

STILLWELL & BIERCE M'F'G CO.
vs.
W. C. HOWARD *et al.*

Now come the defendants in the above-entitled cause and move the court to grant them a new trial on the following grounds:

First. Because the court erred in overruling defendants' motion to suppress the deposition of Wm. Odell, for the reasons stated in said motion.

Second. Because the court erred in sustaining plaintiff's exceptions to so much of defendants' plea in reconvention as sought to recover the sum of $12,000.00, profits defendants alleged could have realized on the sale of 12,000 barrels of flour, all as set forth in said plea.

Third. Because the verdict of the jury is manifestly against the charge of the court in this, that the court charged the jury if they should find the plaintiff had not substantially complied with their contract with defendants, then the plaintiff could recover
33 nothing in this action, and the jury necessarily had to find the plaintiff did not substantially comply with said contract in giving a verdict in favor of defendants against plaintiff for $875.00 damages; wherefore defendants pray the court to grant them a new trial.

(Signed) LINDSLEY & McCORMICK,
Att'ys for D'f'ts.

(Endorsed:) 931. Stillwell & Bierce M'f'g Co. *vs.* W. C. Howard *et al.* Defendants' motion for a new trial. Motion docket No. 43.

Filed Febr'y 12, 1887. A. J. Houston, clerk, by Jas. D. Adams, deputy.

STILLWELL — BIERCE M'F'G CO.
vs.
W. C. HOWARD *et al.* } 931.

This day came the parties, by their attorneys; then came on to — heard defendants' motion to be granted a new trial herein. The argument of counsel thereon being heard and duly considered, it is the opinion of the court that the law is for the plaintiff thereon. It is therefore ordered by the court that the said motion be, and the same is hereby, overruled and a new trial refused; to which ruling of the court defendants excepted.

W. C. HOWARD *et als.*, Plaintiffs in Error,
vs.
STILLWELL & BIERCE M'F'G CO., Defendant in Error.

To the honorable the judges of the Supreme Court of the United States of America:

Your petitioners, W. C. Howard, S. T. Stratton, and J. Raugh, respectfully show to this honorable Court that in the record and proceedings, as also in the rendition of the judgment of a plea in the said circuit court of the United States for the northern district of Texas, at Dallas, at its January term, 1887, wherein The Stillwell & Bierce Manufacturing Company was plaintiff and your petitioners,
W. C. Howard, S. T. Stratton, and J. Raugh, were defendants,
34 a manifest error hath happened, to the great damage of your petitioners, as by said record and proceedings duly appears.

And your petitioners, to the end that error, if any hath been, should be duly corrected and full and speedy justice done to your petitioners in this behalf, respectfully pray that this honorable Court will duly inspect said record and proceedings, and that the judgment rendered in said cause by the circuit court be reversed and a new trial awarded your petitioners.

And, as in duty bound, your petitioners will ever pray, &c.

(Signed) LINDSLEY & McCORMICK,
Attorneys for W. C. Howard, S. T. Stratton, and J. Raugh.

(Endorsed:) No. 931. W. C. Howard *et al.*, plaintiffs in error, *vs.* Stilwell & Bierce M'f'g Co. Petition of plaintiffs in error. Filed Febr'y 25, 1887. A. J. Houston, clerk, by Jas. D. Adams, deputy.

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Stillwell & Bierce Manufacturing Company, plaintiff, and W. C. Howard, S. T. Stratton, and J. Rauch, defendants, a

manifest error hath happened, to the great damage of the said W. C. Howard, S. T. Stratton, and J. Rauch, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice
35½ of said Supreme Court, the 25th day of February, in the year of our Lord one thousand eight hundred and eighty-seven.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

A. J. HOUSTON,
Clerk of the Circuit Court of the United States, at Dallas, Texas.

Allowed by—
A. P. McCORMICK,
United States District Judge for the Northern District of Texas, who was Sitting in the Circuit Court in the Trial of this Cause.

February 25th, 1887.

[Endorsed:] No. 931. W. C. Howard *et als.*, pl'ffs in error, *vs.* Stillwell & Bierce M'f'g Company, def'ts in error. Writ of error. Lindsley & McCormick, att'ys for pl'ffs in error.

36 W. C. HOWARD *et al.*, Pl'ffs in Error,
vs.
STILWELL & BIERCE M'F'G CO., Def't in Error.

To the Stilwell and Bierce Manufacturing Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1887, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Texas, wherein W. C. Howard and others are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 25th day of February, A. D. 1887.

(Signed) A. P. McCORMICK,
U. S. District Judge.

Service admitted this 31 day of March, A. D. 1887.
(Signed) STILWELL–BIERCE M'F'G CO.,
Per CRAWFORD & CRAWFORD,
Attorneys of Record.

(Endorsed:) No. 931. In the Supreme Court of the United States. W. C. Howard *et al.*, plaintiffs in error, *vs.* Stilwell & Bierce M'f'g Co., defendants in error. Citation in error. Filed April 2, 1887. (Signed) A. J. Houston, clerk.

37 Know all men by these presents that we, W. C. Howard, S. T. Stratton, and J. Rauch, as principals, and J. Lobit and W. H. Stratton, as sureties, are held and firmly bound unto Stilwell and Bierce Manufacturing Company in the full and just sum of eighteen thousand ($18,000) dollars, to be paid to the said Stilwell & Bierce M'f'g Co., their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-fifth day of February, A. D. 1887.

Whereas lately, at a term of the circuit court of the United States for the northern district of Texas, at Dallas, in a suit depending in said court between Stilwell and Bierce Manufacturing Company, as plaintiff, and W. C. Howard, S. T. Stratton, and J. Rauch, as defendants, a judgment was rendered against the said W. C. Howard, S. T. Stratton, and J. Rauch, and the said W. C. Howard, S. T. Stratton, and J. Rauch having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Stilwell and Bierce Manufacturing Company, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said W. C. Howard, S. T. Stratton, and J. Rauch shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed)	W. C. HOWARD.	[SEAL.]
(Signed)	J. RAUCH.	[SEAL.]
(Signed)	S. T. STRATTON.	[SEAL.]
(Signed)	J. LOBIT.	[SEAL.]
(Signed)	W. H. STRATTON.	[SEAL.]

Approved by—
(Signed) A. P. McCORMICK,
U. S. Distr. Judge, Sitting in the Circuit Court in the Trial of the Case.

(Endorsed:) Writ of error bond. Filed April 2, 1887. A. J. Houston, clerk.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

STILWELL & BIERCE MAN'F'G CO.
vs.
W. C. HOWARD *et al.* } No. 931.

Be it remembered that in the trial of said cause at said term, before the Hon. A. P. McCormick, judge, and the jury, the defendants moved the court to suppress the deposition of William Odell, and in support thereof filed the following reasons in writing:

1st. Because said deposition is not certified to by the officer
38 who took the same, as required by law regulating the taking of depositions *de bene esse.*

2nd. Because no reasonable notice of the time and place of taking said deposition was given the defendants, as required by law regulating taking of depositions *de bene esse.*

3rd. Because said deposition was — tak*ing* under authority of any *dedimus protestatem* granted by any court of the United States according to common usage.

The deposition of said William Odell was as follows:

United States Circuit Court, Fifth Circuit *Court* and Northern District of Texas, at Dallas.

The President of the United States of America to any clerk of a court of record having a seal, any notary public, or any commissioner of deeds, duly appointed under the laws of the State of Texas, within the State of New York, Greeting:

Know ye that we, in confidence of your prudence and fidelity, have appointed you or either of you and by these presents do give unto you full power and authority diligently to examine William Odell, of Rochester, Monroe county, New York, upon certain interrogatories propounded to him in a cause wherein Stillwell and Bierce M'f'g Co. are plaintiffs and W. C. Howard *et al.* are defendants, which said cause is now pending in the circuit court of the United States for the fifth circuit and northern district of Texas, *in the fifth circuit,* and therefore we command that you, at certain days and places to be appointed by you for that purpose, cause the said witness to come before you, and then and there examine him upon the said interrogatories and any cross-interrogatories (originals whereof are hereto annexed) on his corporal oath first taken before you upon the Holy Evangelist, or in such a solemn manner as is and may be authorized by law, and that you take the answers of the witness to such interrogatories and reduce the same to writing, and you shall certify under your hand and seal that the same was signed and sworn to by said witness before you, and shall seal them up in an envelope, with the
39 interrogatories and this commission, with your name written across the seal, and indorse on the envelope the names of the parties to the suit and the name of the witness and direct the package

to the "clerk of the circuit court of the United States for the northern district of Texas, Dallas, Texas."

If sent by mail the postmaster or his deputy mailing the same shall indorse thereon that he received them from the hands of the officer before whom the answers to said interrogatories were taken.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court thereof, at Dallas, in said district, this 4th day of January, in the year of our Lord eighteen hundred and eighty-seven, and of American Independence the 111th year.

A. J. HOUSTON,
Clerk of said Circuit Court.

NOTE.—The officer who executed this writ is requested to endorse on the reverse side an itemized statement of his own and any witness or other fees incurred, crediting any payment made thereon.

HOUSTON, *Clerk.*

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

STILLWELL & BIERCE M'F'G CO.
vs.
W. C. HOWARD *et al.* } No. 931.

To the defendants of the above-entitled cause or to the Messrs. Lindsley & McCormick, their attorneys of record:

Take notice that 5 days after the service hereof we shall apply to the clerk of the United States circuit court in and for the northern district of Texas, at Dallas, for a commission to take the answers of William Odell, who resides at the city of Rochester, in the county of Monroe, in the State of New York, to the accompanying interrogatories. The answers of said witness will be read in evidence on behalf of the plaintiff upon the trial of this cause.

CRAWFORD & CRAWFORD,
Att'ys for Plaintiff.

40 Int'g. 1. State your age and place of residence and your occupation.

Int'g. 2. This is a suit instituted by the Stillwell & Bierce M'f'g Co. against W. C. Howard, J. Rauch, and S. T. Stratton, all of Dallas county, to recover a balance due upon a contract entered into between the Stillwell & Bierce M'f'g Co. and said Howard, Rauch, and Stratton about March, 1885, for the reconstruction of a mill in the city of Dallas, Texas, by placing certain machinery therein. State whether you are acquainted with the parties of this suit or either of them and how long you have known them.

Int'g. 3. In whose employ was you about June, 1885, and for what purpose were you employed and where was said employment had? If in answer you state that you were employed by the Stillwell &

Bierce M'f'g Co. to superintend the putting in of machinery into the mill of the defendants at Dallas, state when you left Dayton and how many men, if any, you brought with — and what time you reached Dallas.

Int'g. 4. State whether or not the building into which this machinery was to be placed was completed at the time you reached Dallas with your men; and, if not, state how much was incomplete and how near the building was ready for the machinery. State fully in answer to this.

Int'g. 5. If you say that the building was not ready for the machinery, then state whether or not you were delayed with your men before you could commence work; and, if yea, how long was you so delayed. Where was the machinery when you reached Dallas?

Int'g. 6. State when the house was ready for the machinery, and if you encountered any obstacle or delays in putting in the machinery by reason of the non-completion of the building state fully how long you were delayed and the occasion for it.

Int'g. 7. State whether or not after the said building was ready there was any delay in putting in said machinery. State the manner in which you proceeded to work with reference particularly to the diligence used by you and the men who came with you or who were afterwards employed by you in putting in said machinery and completing said contract. State whether there was any
41 unreasonable or unavoidable delay upon your part or the part of the men engaged with you after the building was ready for the machinery.

Int'g. 8. Can you say when the machinery was unloaded at the house?

Int'g. 9. State when the work of putting in of the machinery was completed.

CRAWFORD & CRAWFORD,
Att'ys for Pl't'fs.

(Endorsed:) Stillwell & Bierce M'f'g Co. *vs.* W. C. Howard *et al.* Interrogatories to Wm. Odell, a witness for the plaintiff. We waive copy of interrogatories and consent that commission may issue upon the original, direct, and cross interrogatories. Lindsley & McCormick, att'ys for defendants.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

STILLWELL & BIERCE MAN'F'G CO. *vs.* W. C. HOWARD *et al.* } No. 931.

Cross-interrogatories filed by the defendants to the interrogatories-in-chief filed by plaintiff, addressed to the witness, William Odell.

Cross-interrogatory first. Where do you now reside, how long have you resided there, and what has been your occupation since you left Dallas, Texas?

LINDSLEY & McCORMICK,
Att'ys for Defendants.

Deposition of William Odell, named in the hereto-annexed commission, in answer to the interrogatories and cross-interrogatories thereto annexed, taken before me, Z. L. Davis, a notary public in and for the county of Monroe and State of New York, at my office, in the city of Rochester, in said county, on the 18th day of January, 1887.

The said William Odell, being duly sworn by me for it in said action, as required in said commission, doth depose and say, in answer *in* the first direct interrogatory, as follows:

42 Answer. I am thirty-seven years old. I have no permanent home. I reside at present at Rochester, N. Y. I am a millwright by occupation.

In answer to the second interrogatory he says: I know all the plaintiffs; also all the defendants. I have known the plaintiffs five or six years and the defendants since June, 1885.

In answer to the third interrogatory he says: In June, 1885, I was in the employ of said Stillwell & Bierce M'f'g Co. to superintend the putting of the machinery into the mill of defendants at Dallas, Texas. I left Dayton, Ohio, May 28, 1885, and arrived at Dallas, Texas, June the first, 1885. I brought four men with me from Dayton.

In answer to the fourth interrogatory he says: The building was not completed when I reached Dallas. The defendants were putting in the joist of the second story. One story and an attic were added after our arrival. For one whole week all my men and myself were idle because — the incomplete state of the building. After one week after our arrival I put two men at work in a storage room over the engine-room and my other two men went to work for the defendants in the elevator.

In answer to the fifth interrogatory he says: We were delayed, as stated in my last answer. The machinery left Dayton before we did and was on the road when we reached Dallas.

In answer to the sixth interrogatory — saith: The mill-house was not completed until about the middle of July, 1885. It was not ready for the machinery before June 20th, 1885. After I had begun I was delayed by the defendants laying the floor and whitewashing the building. Myself and my men were delayed three or four days in all on this account. I did not, on account of the unfinished state of the building, put — a full crew until June 29th, 1885.

43 In answer to the seventh interrogatory he saith: As soon as the state of the building would permit me to do so I put on all the force I could use and continued the work with all the diligence that possibly could be used until the mill was completed. There was no delay on my part or of my men whatever. The work was progressed and pushed as fast as it was possible to do.

In answer to the eighth interrogatory he saith: I began unloading the machinery June the 20th, 1885, and finished unloading about 10 days after that time.

In answer to the ninth interrogatory he saith: It was completed about August 26th, 1885.

(Signed) WILLIAM ODELL.

In answer to the first cross-interrogatory he saith: I now reside in Rochester, N. Y. I have resided here since August the 10th, 1886. Since I left Dallasmy occupation has been millwrighting.

WILLIAM ODELL.

STATE OF NEW YORK, }
Monroe County. }

I, Z. L. Davis, a notary public duly sworn, appointed, and qualified within & for the county & State aforesaid, do hereby certify that, at my office, in the city of Rochester, N. Y., in said county, on the 18th day of January, 1887, *that* I caused the within-named witness, William Odell, to come before me, and after his being duly sworn as a witness in said action I proceeded to take his answers to said interrogatories and cross-interrogatory; that after giving the same the same were signed by him in my presence and sworn to by said William Odell before me, as required by said commission.

Given under my hand and seal of office, at Rochester, Monroe county, State of New York, this 18th day of January, 1887.

Z. L. DAVIS,
Notary Public, Monroe County, New York.

(Endorsed:) Opened and filed February 5th, 1887. A. J. Houston, clerk; Jas. D. Adams, deputy.

Which motion to suppress said deposition was overruled by the court and the deposition admitted and read in evidence; to which ruling of the court the defendants then and there excepted.

Afterwards the plaintiffs moved the court to strike out so much of defendants' answer as seeks to recover the sum of one dol-
44 lar per barrel on twelve thousand barrels of flour; which said motion was sustained by the court; and so much of defendants' plea in reconvention as alleges "that there was a ready cash market in Dallas all the time for flour of the grade said mills would have made if constructed as plaintiff had agreed it should be, and defendants could have sold all of this said flour it could have made during said unnecessary delays caused by plaintiffs, viz., 200 barrels per day, and that plaintiff, by reason of the facts above stated, delayed defendants in the manufacture of said flour for sixty days, by which defendants lost a profit of $1.00 per barrel on 12,000 barrels of flour, or the sum of $12,000.00, by reason of all of which defendants say the plaintiff justly owes them the sum of twenty thousand dollars.

Defendants therefore pray for a judgment in their favor against the plaintiff for said sum of money above set forth," was stricken out of defendants' plea in reconvention by the court; to which ruling of the court the defendants then and there excepted.

The plaintiff then introduced in evidence the contract between the plaintiff and defendants, which contract was in words and figures as follows, to wit:

"This agreement, between the Stillwell and Bierce Manufacturing Company, of Dayton, Ohio, of the first part, and W. C. Howard, J.

Rauch, and S. T. Stratton, of Dallas, Texas, witnesseth: That said party of the first part hereby covenants and agrees with the said party of the second part to reconstruct the mill of said party of the second part upon the roller system, placing therein the following machines:

Seven (7) 9″ x 24″ Odell double roller mill.
One (1) 9″ x 30″ " " " "
Fourteen (14) bolting reeds 16′ x 30′.
Eight (8) scalping " 7′ x 30′.
Four (4) No. 3 C. N. Smith's centrifugal reels.
Four (4) No. 1 Geo. T. Smith purifiers, with aspirators.
Three (3) No. 0 " " " " " "
One (1) double middlings aspirator.
One (1) No. 3 Wm. Richmond horizontal bran duster.
Three (3) flour packers; one (1) bran packer.
45 Two (2) " " scales; one (1) wheat heater.
Three (3) No. 4 Prinz dust collectors, with fire attachments.
One (1) No. 2 Wm. Richmond wheat separator.
One (1) No. 4 " smut machine & separator.
One (1) No. 4 " adjustable brush machine.

One (1) No. 1 Hunt double cylinder brush machine, and all other machinery and material necessary to erect and complete a flour mill of 200 barrels capacity in 24 hours, according to plans to be made by party of the first part, and to be placed by them in the mill-house to be built by party of the second part in Dallas, Texas; party of the second part to furnish proper motive power to drive said machinery and to extend engine shaft into basement of mill-house to a point to be hereafter designated by party of first part and not to exceed eight feet inside of basement wall. Party of the second — are to build all brick or stone foundations for machinery and frame all openings on floors for packers, upright shafts, &c. The party of the first part agrees to have the mill completed and ready to run on or before July 15th, 1885, provided party of the second part shall have mill-house ready by June 1st, 1885. The said party of the first part guarantees that said mill, when completed, shall have a capacity of from 200 barrels or more of flour in twenty-four hours, and that the results shall be equal to those of any of the roller or other modern systems of milling now in use in this country using the same grades of wheat. The said party of the first part shall perform all the millwright work, which shall be done in a good and workmanlike manner, and shall furnish all materials therefor, except such as are now in said mill and can be utilized, which may be used free of charge by said party of the first part; and said party of the second part hereby covenants and agrees to pay said party of the first part for said machinery, materials, and labor the sum of seventeen thousand eight hundred and fifty dollars as follows: $7,000 cash on shipment of said machinery and
46 $7,000 in nine months from date of shipment of said machinery; $3,850 in twelve months from date of shipment of said machinery.

Party of the second part to keep the mill insured for the benefit of the party of the first part as — their interest may appear in case of fire, for which said party of the second part agrees to execute and deliver promissory notes to party of the first part, dated time of shipment of machinery, bearing 8 per cent. interest, and secured as follows: To be satisfactory to the parties of the first part. No claims for damages shall be made by said party of the second part on account of delays incident to starting up. The said party of the second part agrees to be responsible for any damage or loss by fire or otherwise after the machinery reaches Dallas. The title to said machines shall remain in and not pass from said party of the first part until the same are paid for and until all the notes, whether secured or unsecured, given therefor are fully paid; and in default of payment as above agreed said party of the first part or its agents may take possession of and remove said machinery without legal process.

STILWELL & BIERCE M'F'G CO.,
Per J. W. McKEEN, *Agent.*
W. C. HOWARD.
S. T. STRATTON.
J. RAUCH.

Plaintiffs introduced evidence tending to show that the contract was complied with on the part of plaintiff. In rebuttal of the defendants' case the plaintiff introduced other evidence besides the deposition of Odell, tending to prove that the contract was complied with on the part of plaintiff and that the building was not completed by June 1, 1885. The defendants introduced evidence tending to show that the mill contracted to be built by plaintiff for defendants was not completed within a reasonable time and was defectively made, and that defendants were delayed in the manufacture of flour by reason of the delay of plaintiff in completing said mill and its defective construction.

The defendants then offered to prove by W. C. Howard, S. T. Stratton, and J. Rauch "that the market price per barrel for
47 flour of the grade the contract sued upon stipulated for, between the date of middle of July, 1885, and middle of September, 1885, was five dollars per barrel; that during said period there was a ready cash market value in Texas for said grade of flour at $5.00 to $5.50 per barrel, and that defendants could have sold 200 barrels per day during said period, and that upon each barrel so sold they would have realized $1.00 per barrel profit; that defendants had purchased and held in storage during that period a sufficienty quantity of good wheat to have manufactured 200 barrels of flour per day during said sixty days; that the market during said period for such wheat was 60 cents to 70 cents per bushel and the expense of turning such wheat into flour during said period was 80 cents per barrel, and that defendants had in their employ all necessary laborers and skilled workmen to manufacture said wheat into flour, and were fully equipped with fuel and water and every-

thing necessary to convert said wheat into flour, save and except the parts and pieces of said mill which plaintiff contracted to furnish in the contract sued on.

The court overruled defendants' written offer to prove said facts by said witnesses, except the fact of the amount of wheat which defendants had on hand during said period; to which ruling of the court the defendants then and there excepted.

The above and foregoing is a statement of only so much and such parts of the evidence given and offered upon said trial as relate to the matters herein excepted to.

The defendants tender in term time this bill of exceptions to the above-set-forth rulings of the court and pray that the same be allowed, sealed and signed, and filed and made a part of the record in this cause, and it is accordingly so ordered.

Given under my hand and seal, with scroll for seal.

(Signed) A. P. McCORMICK, [SEAL.]
U. S. District Judge.

February 25th, 1887.

48 (Endorsed:) No. 931. W. C. Howard *et al.*, plaintiffs in error, *vs.* Stilwell & Bierce M'f'g Co., defendants in error. Bill of exceptions. Filed Febr'y 26, 1887. A. J. Houston, clerk, by Jas. D. Adams, deputy.

In the Supreme Court of the United States. October Term, 1887.

W. C. HOWARD *et al.*, Plaintiffs in Error,
vs.
STILLWELL & BIERCE MANUFACTURING COMPANY, Defendants in Error.

And now come the defendants in the above-entitled cause, by their counsel, and make the following assignment of errors therein:

First. Because the court erred in overruling defendants' motion to suppress the deposition of William Odell for the reasons stated in said motion. See defendants' bill of exceptions.

Second. Because the court erred in sustaining plaintiff's exception to so much of defendants' plea in reconvention as sought to recover the sum of twelve thousand dollars' profits defendants alleged they could have realized on the sale of twelve thousand barrels of flour, all as set forth in said plea in reconvention. See defendants' bill of exceptions.

Third. Because the court erred in this: On the trial of the above cause the defendants offered to prove by W. C. Howard, J. Rauch, and S. T. Stratton that the market price per barrel for flour of the grade the contract plaintiff sued upon stipulated for between the date of the middle of July, 1885, and the middle of September, 1885, was five dollars per barrel; that during said period there was a ready

cash market value in Texas for said grade of flour at five to five and a half dollars per barrel, and that defendants could have sold two hundred barrels per day during said period at five dollars per barrel, and that upon each barrel so sold they would have realized one dollar per barrel profit; that defendants had purchased and held in storage during that period a sufficient quantity of good wheat to have manufactured two hundred barrels of flour per day during said sixty days.

49

That the market price during said period of such wheat was sixty to seventy cents per bushel, and the expense of turning said wheat into flour during said period was eighty cents per barrel, and that defendants had in their employ all necessary laborers and skilled workmen to manufacture said wheat into flour and was fully equipped with fuel and water and everything necessary to convert said wheat into flour, save and except the parts and pieces of said mill which plaintiff contracted to furnish in the contract plaintiff sued upon; all of which testimony defendants offered in support of that portion of defendants' plea in reconvention which sought to recover the profits on twelve thousand barrels of flour; all of which evidence, when so offered for said purpose by the defendants, the court refused to allow the defendants to introduce. See defendants' bill of exceptions.

(Signed) LINDSLEY & McCORMICK,
Attorneys for W. C. Howard et al.

(Endorsed:) No. 931. W. C. Howard *et al.*, plaintiffs in error, *vs.* Stilwell & Bierce M'f'g Co., defendant in error. Assignment of error. Filed Febr'y 25, 1887. A. J. Houston, clerk, by Jas. D. Adams, deputy.

50 UNITED STATES OF AMERICA, }
Northern District of Texas, at Dallas. }

I, A. J. Houston, clerk of the United States circuit court for the northern district of Texas, at Dallas, do hereby certify that the foregoing forty-nine pages contain a full, true, and correct transcript of the opening order, original petition, defendants' original answer, defendants' plea in reconvention, leave to amend, plaintiff's 1st amended original petition, defendants' 1st amended original answer and plea in reconvention, deposition of William Odell, verdict, judgment, defendants' motion for a new trial, order refusing new trial, petition of plaintiffs in error, writ of error bond, bill of exceptions, assignment of errors, and the original of the writ of error and copy of citation in error in cause No. 931, law, on the docket of said court and styled Stilwell & Bierce Manufacturing Company *vs.* W. C. Howard *et al.*, all of which appears from the records of said court.

The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.

In testimony whereof I have hereunto affixed the seal of said court, at Dallas, Texas, and the signature of the clerk thereof this 30th day of September, A. D. 1887.

A. J. HOUSTON, *Clerk*,
By JAS. D. ADAMS, *Deputy*.

Endorsed on cover: N. Texas C. C. U. S. No. 480. W. C. Howard, S. T. Stratton, and J. Rauch, plaintiffs in error, *vs.* The Stillwell and Bierce Manufacturing Company. Filed October 11, 1887.

Office Supreme Court U. S.
FILED,
JAN 20 1891
JAMES H. MCKENNEY,
CLERK.

[Jan. 13, 1891.]

Supreme Court of the United States.

OCTOBER TERM, 1890.

W. C. HOWARD, ET AL.

vs.

STILLWELL AND BIERCE MANUFACTURING COMPANY.

No. 180.

BRIEF FOR PLAINTIFFS IN ERROR.

W. HALLETT PHILLIPS,
For Plaintiffs in Error.

R. O. Polkinhorn, Printer.

Supreme Court of the United States.

OCTOBER TERM, 1890.

W. C. HOWARD, ET AL.

vs.

STILLWELL AND BIERCE MANUFACTURING COMPANY.

No. 180.

Brief of W. Hallett Phillips for Plaintiff in Error.

The defendants below, the plaintiffs in error here, were millers, owning and operating a mill in Dallas, Texas.

On March 23d, 1885, they entered into a contract with the Stillwell and Bierce Co, by which the latter agreed to reconstruct the mill upon the roller system, the company stipulating to place in the mill the required machinery—

> "necessary to erect and complete a flour mill of two hundred barrels capacity in twenty-four hours, according to plans to be made by the party of the first part (the company), and to be placed by them in the mill-house to be built by the party of the second part (the defendants), in Dallas, Texas, party of the second part, to furnish proper motive power to drive said machinery and to extend engine shaft into basement of mill-house to a point to be hereafter designated by party of first part, and not to exceed eight feet inside

of basement wall. Party of second part are to build all stone or brick foundations for machinery and frame all openings in floor for packers, upright shafts, &c., The party of the first part agrees to have the mill complete and ready to run on or before July 15th, 1885, provided, party of second part shall have mill-house ready by June 1st, 1885. The said party of the first part guarantees that said mill when completed shall have a capacity for from 200 or more barrels of flour in twenty-four hours, and that the results shall be equal to those of any of the roller or other modern systems of milling now in use in this country using the same grades of wheat. The said party of the first part shall perform all of the mill-wright work, which shall be done in a good and workmanlike manner—and shall furnish all materials therefor, except such as are now in said mill and can be utilized, which may be used free of charge by said party of the first part; and the said party of the second part hereby covenants and agrees to pay the said party of the first part for said machinery, materials and labor, the sum of seventeen thousand eight hundred and fifty dollars, as follows: $7.000 cash on shipment of said machines, and $7.000 in nine months from date of shipment of said machinery; $3.850 in twelve months from date of shipment of said machinery." (R., 6. 7.)

The cash payment was duly made.

The suit was brought by the company, on the contract, to recover the amount of the deferred payments, on the allegation that the contract on their part had been performed.

The answer denies generally the allegations of plaintiff's petition. (R. 2.)

The defendants also filed a plea in reconvention, as permitted by the Texas practice. (R. 2.)

This denied that plaintiffs had performed their contract, or that they were entitled to recover thereon.

It seeks to recover from plaintiffs the amount of losses caused by the failure of the company to fulfil the contract.

The plea alleges non-compliance by the company with the stipulation to have the mill completed within the contract time.

It also sets up the obligation of the company to complete the mill within a reasonable time and without unnecessary delay.

It is further alleged that the company did not furnish the machinery nor complete the mill within a reasonable time nor in a workmanlike manner, nor furnish the defendants all of the machinery they had contracted to furnish.

That not only did the company delay the work beyond the contract time, but that, in addition, they left the mill in so incomplete a condition that the defendants had, at a considerable expense, to rectify the errors made by the company, and complete the work as it had been contracted to be performed.

The defendants had purchased large supplies of wheat to grind in the mill, relying upon the agreement of the company to construct the mill according to contract and within the time specified.

This grain they had to hold at great expense until the mill was made ready by the defendants to grind the same.

It is alleged that there was a ready cash market in Dallas, all this time, for the grade of flour said mill would have manufactured, if constructed as plaintiff had agreed:

"And defendants could have sold all of this said flour it could have made during said unnecessary delays, caused by plaintiff, viz., 200 barrels per day, and that plaintiff, by reason of the facts above stated, delayed defendants in the manufacture of said flour for sixty days, by which defendants lost a profit of $1.00 per barrel on 12,000 barrels of flour, or the sum of $12,000." (R., 11, 12.)

An exception by the plaintiff, was filed as to so much of the plea in reconvention, as sought the recovery of profits. (R., 14.)

In support of this portion of the plea, the defendants offered to prove that the market price for flour of the grade stipulated for by the contract between the date of middle of July, 1885, and middle of September, 1885, was five dollars per barrel.

That during that period there was a ready cash market value in Texas for such grade of flour at $5.00 to $5.50 per barrel, and that defendants could have sold 200 barrels per day during said period at $5.00 per barrel; and that upon each barrel so sold they would have realized a profit of $1.00 per barrel.

That defendant had purchased and held on storage during said period a sufficient quantity of good wheat to have made 200 barrels per day during said sixty days.

That the market price, during the said period of such wheat, was 60 to 70 cents per bushel, and the expense of turning such wheat into flour during such period was 80 cents per barrel; and that the defendants had in their employ all necessary laborers and skilled workmen to manufacture said wheat into flour, save and except the parts and pieces of said mill which plaintiff contracted to furnish in the contract sued on. (R. 15.)

Notwithstanding this offer of evidence, the exception of plaintiff was sustained. The court overruled defendants' offer to prove said facts, except the fact of the amount of wheat which defendants had on hand during said period.

To such action exception was duly taken by defendants. (R. 33.)

The defendants introduced evidence tending to show that the mill contracted to be built by plaintiff for defendants was not constructed within a reasonable time, and was defectively made, and that defendants were delayed in the manufacture of flour by reason of the delay of plaintiff in completing said mill and its defective construction. (R., 32.)

The jury rendered a verdict, awarding to the plaintiff $12,332.82 "due on contract," and found for the defendants the sum of $875 "as damages." There was judgment accordingly. (R., 21.)

The defendants prosecuted a writ of error.

Assignment of Errors.

1. There was error in sustaining the exception to that part of defendants' plea which sought the recovery of profits, and in rejecting defendants offer of evidence in support of the plea.

2. The court erred in overruling defendants' motion to suppress the deposition of Odell.

Argument.

(1.) The suit is one brought on the contract.

The defense is based on the non-fulfillment of the contract, by which special damage accrued to the de-

fendants. This they seek to recover by way of reconvention.

The verdict, giving defendants damages, is a finding in favor of defendants of the non-performance of the contract by plaintiff.

The special damages claimed for the violation of the contract were such as naturally and immediately resulted from such violation.

They were not speculative nor remote.

It is shown that the contract by which the plaintiffs undertook to reconstruct the mill and have it in running order, stipulated that it should be completed on or before July, 1885, if the mill-house was ready by June 1, 1885.

In a contract of this nature, and with the objects the parties had in view, time was essential.

The company knew that the defendants were engaged in the active operations of milling.

The company proposed to reconstruct the mill upon their system, with the promise to secure the stipulated results.

This reconstruction necessarily suspended the operations of the mill while being effected.

With the expectation of recommencing operations upon the new system, at the date of completion under contract, defendants had stored grain sufficient to run the mill to the capacity stipulated by the contract.

The company held out to the defendant, the inducement of a better result under the new system to be introduced by them, than by the use of that under which the mill had been therefore operated. They also contracted for an increased capacity.

It was to reap the profits to result from these improvements that defendant entered into the contract and acquired a quantity of grain, sufficient to run the mill, according to its increased capacity.

They had every thing in readiness to manufacture the grain into flour of the grade provided for by the contract. For such flour there was an established market.

By the company's failure to complete the mill according to the contract, the defendants were deprived of this market for a considerable period of time, during which the mill was idle.

Such delay being in violation of the contract, the company should bear the direct consequences of such violation.

The defendants' plea alleged the obligation of the company to complete the work within the time of the contract.

This they had not done, but on the contrary had so delayed and neglected the work as to put defendants to great loss.

The proof offered by the plaintiffs, as to the completion of the work, is contained in the deposition of Odell.

The motion of defendants to suppress this deposition will be considered later on.

Odell was the foreman of the company, and superintended the reconstruction of the mill.

He says the mill was ready for the machinery June 20, 1885. That he began unloading the machinery June 20th, and finished unloading about ten days after that time.

The work was completed about August 26th, 1885. (R. 29.)

Under the contract, the company agreed to complete the work in the period of forty-five days from the time it commenced work on the mill.

This is the construction of a somewhat similar contract for putting machinery in a boat, within sixty days from completion of the boat. The boat was not completed within the sixty days, and it was held that the contractor was bound to furnish the work sixty days from the time the boat was furnished. (*McGowan* vs. *Am. Tan Bark Co.*, 121 U. S., 600.)

The verdict, giving defendants damages, is conclusive of the fact that the company had not complied with their contract.

By the company's own statements, the work was not completed for over sixty days from the time it commenced work.

The defendants were damaged by being prevented from manufacturing, for the period of delay, the grain they had accumulated and were deprived of the profits, the proof shows, they would have realized from the sale of the flour.

The contract entitled the defendants to the completed mill, on the contract date, of 200 barrels capacity in twenty-four hours.

The court should have submitted the evidence under this head to the jury, in order that they might find what was the loss sustained by defendants arising from the breach of the contract.

The damage resulting to defendants from the loss of the use of their mill, can only be properly estimated by the amount of the gain they would have made but for such deprivation.

It is well settled that there are profits which cannot be recovered as damages, not only because speculative and contingent, but as having no connection with the contract of the parties. They were not in contemplation of the parties when they made their contract.

The profits sought to be recovered in the present suit were the advantages and the direct and immediate fruits of the contract.

The measure of damage in such a case is the amount that would have been received if the contract had been kept. In other words, what would the mill have earned?

That the defendants can recoup the damages growing out of the violation of the contract, is well settled.

Dushane vs. *Benedict*, 120 U. S., 637.

In that case an action was brought to recover the contract price of rags.

The defendant interposed a counter claim, alleging damages by reason of the rags being infected with small-pox.

It was proved that such rags could not be made into paper—the purpose for which they were bought—without injury to the workmen. That defendant had paid out money to support the workmen who had been disabled by the disease; besides evidence that the defendants, in consequence of the injury to their business by the small-pox introduced by the rags, were obliged to run their mill short-handed, and lost a considerable part of a profitable country trade.

This evidence was held competent for the consideration of the jury, on the question of damages; and it

was further held that the defendants, by way of recoupment, could recover such damages as in the contemplation of the parties, or according to the natural or usual course of things, were the consequence of the breach of warranty.

The profits in the present case, as ought to be recovered, flow naturally and directly from such nonperformance. As such they come within the rules announced in *Western Union Telegraph Co.* vs. *Hall*, 124 U. S., 455.

The court there observe, that the loss of a market, may be made an element of damages against a carrier for delaying delivery, where it was understood, either expressly or from the circumstances of the case, that the object of delivery was to get the benefit of the market.

The same rule has been applied to telegraph companies for delaying the delivery of messages.

New York Mining Co. vs. *Fraser*, was an action brought for contract price of machinery, engaged to be furnished and erected on mining property as a a silver mill.

The defence was founded on the defective nature of the machinery and the delay in its erection.

The defendant sought to recover damages as against the purchase price.

The court below refused instructions predicated on the loss of the use of the mill arising from the defective machinery.

It also refused to charge that, if there was a breach of the contract on plaintiff's part, defendant was entitled to recover the necessary and immediate loss of profits during the period when the defendant was,

by reason of the defects, deprived of the use of the mill.

In affirming the judgment, the court held it was not necessary to decide whether the instructions were correct as stating general principles governing the law of damages, since the evidence was not such as to prove the facts which the instructions assumed. (130 U. S., 619.)

The measure of damages is, *prima facie*, the sum as the mill would have earned in its ordinary employment.

In the leading case of *Hadley* v. *Baxendale*, 9 Exch. 341, profits were disallowed, because the defendant did not know that the mill was kept idle by want of the shaft which had been delivered to be repaired.

In *Hinkley* v. *Beckwith*, the lessees of a saw mill who had a large stock of logs, were held entitled to recover profits they would have made from sawing the lumber, during the time the lessees delayed to repair the mill according to their contract. (13 Wisc., 31.)

The cases, as to the allowance of profits, are collected in Sedwick, Damages, Vol. 1, p. 216, 7 Ed., note on rule in *Hadley* v. *Baxendale*.

The damages ought to be recovered are not such as were caused by loss on collateral undertakings or engagements made by the defendant with strangers to the contract.

The circumstances of this case are like those in *Davis* vs. *Talcott*, (14 Barb. S. C., 617), in which profits were held recoverable.

There the defendants undertook to put machinery in a mill by a certain time.

The proper machinery was not furnished, nor was the work done in the stipulated time.

The plaintiff had to supply the defects, and was kept out of the use of his mill a considerable time.

He brought his action to recover damages for breach of contract, consisting in the cost of providing suitable machinery, the loss of the use of the mill, and the loss of the gains and profits which he would have made in that time in the manufacture of flour.

He introduced testimony to show the capacity of the mill, and that he had wheat on hand during the time of the delay.

The jury were charged that the plaintiffs were entitled to recover: 1. Such sum as was sufficient to put the machinery in such condition as was contemplated by the contract; 2. Such sum as the mill would have earned during the time it was necessarily delayed in consequence of the defects in the machinery; and in connection with this, the jury were to take the fair ordinary earnings of the mill, after deducting the expense of running the same from the gross earnings, thereby arriving at the net profits.

That, in case the contract was not performed in a reasonable time, the jury were to ascertain what length of time it was unreasonably delayed, and then if they should find that plaintiff was in condition to work the mill by having stock to grind, and was prevented from grinding the same by such unreasonable delay, the plaintiff was entitled to damages to the gross amount of earnings of said mill, after deducting the expenses of running the same.

The Supreme Court, in affirming this ruling, say

the allowance of damage was only for the loss of the use of the mill.

That it would be most unjust to compel the owner of a mill to lose the entire use of his mill during the time defective machinery is undergoing repairs, and be permitted to recover barely the cost of putting it in the condition the contract required it to be put.

When a contractor undertakes to put a mill or other machinery in operation, he ought to be holden to indemnify the other party against the loss of the use of the building, mill or other machinery, after the expiration of the time for performance of the contract. And in case it was defectively made, he should indemnify the party for the loss of the use of the property for the time necessarily required to repair it and put it in order.*

(2.) It was error to admit the deposition of Odell.

Upon this testimony reliance was placed by the company as showing their right to recover under the contract.

The deposition was not taken under any provision of the United States Revised Statutes.

It is said that the deposition was taken according to the practice of the state, and that such practice has been adopted by the United States Circuit Court.

But section 914 R. S., as to adoption of State practice, has no applicationto the mode of taking evidence in the United States Courts.

This subject is regulated by specific provisions of Federal law. *Beardsley* vs. *Littell* 14. Blatch., 103. *U. S.* vs. *Pings*, 4. Fed. Rep., 715.

*This case is frequently cited in the text of Sedgwick on Damages. It is noted that it was reversed on appeal, but not on the point here involved. Sedgwick, Dam., 7 Ed., 120, 121.

Judge Turner, of the Western District of Texas, has held that, as the manner of taking depositions had been prescribed by act of Congress, the State law was not applicable, and that the Circuit Court was without power to adopt the State regulations.

This conclusion the Court arrives at after an elaborate consideration of the statutes and authorities.

The same view is mentioned as entertained by Judge Choate and Judge Swing. *Randall* vs. *Venable*, 17 Fed. Rep., 162.

It should be stated that the contrary was held by Judge McCormick, of the Northern District of Texas, in the case of *Warren* vs. *Younger*, 18 Fed. Rep. 862.

We submit that the judgment should be reversed,

W. HALLETT PHILLIPS,
For Plaintiffs in Error.

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DEC 9 1890
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OCTOBER TERM, 1890.

W. C. HOWARD ET AL.,
PLAINTIFFS IN ERROR,
v.
THE STILLWELL & BIERCE MANUFACTURING CO.,
DEFENDANT IN ERROR.

No. 180.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR DEFENDANT IN ERROR.

JOHN JOHNS,
Of Counsel for Defendant in Error.

WASHINGTON:
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In Error to the Circuit Court of the United States for the Northern District of Texas.

BRIEF OF JOHN JOHNS, OF COUNSEL FOR DEFENDANT IN ERROR.

The brief of my colleague in this cause contains a short statement of the salient facts in the printed Record.

As to the first assignment of error (p. 33 of Record), we submit that this is a deposition taken under a *dedimus potestatem* or commission, issued January 4, 1887 (p. 26 of Record), the cause being at issue May 20, 1886 (p. 2.) It is not a deposition *de bene esse*. That fact disposes of

the 1st and 2d objections to it in the bill of exceptions (p 26.) As to the 3d objection, that it was not taken "under authority of any *dedimus potestatem* granted by any court of the United States *according to common usage*," we submit that the rule is that where such an objection is made the bill of exceptions must contain a sufficient statement of the objection on the ground of informality to enable the court to see whether it is a valid objection (Spaids *v.* Cooley, 113 U. S. 278). This general objection, that the commission was not "granted by any court of the United States according to common usage," contains no sufficient statement of the objection by which this Court can see whether it is valid.

The cross-examination of the witness Odell by counsel for plaintiffs in error was a waiver of exceptions to the regularity of his deposition. (Mechanics' Bank of Alexandria *v.* Seaton, 1 Peters, 299; Shutte *v.* Thompson, 15 Wall. 151.)

The deposition was filed in the cause January 22, 1887, and on February 5, 1887, it was opened at request of the attorney for the defendant in error (p. 16). The motion to suppress for defects and irregularities was not made till the cause was on trial, February 8, 1887 (p. 15). It was then too late to make the objection. (Winans *v.* N. Y. & Erie R.R., 21 Howard, 88; Doane *v.* Glen, 21 Wall. 33; York Co. *v.* Ill. Cent. R.R., 3 Wall. 107.)

The laws and practice of Texas, and the rules of the United States courts there on the subject of taking depositions under a commission are set forth fully in the brief of my colleague.

As to the second and third assignments of error, that the court below erred in striking out so much of the plea in reconvention "as sought to recover the sum of twelve thousand dollars, profits defendants could have realized on

the sale of twelve thousand barrels of flour," and in rejecting evidence to sustain such claim for damages, we submit the court did not err in so doing.

1. Because that part of the plea which was stricken out claimed damages for an alleged breach of contract, which damages were incapable of certain ascertainment, were remote, speculative, and contingent. (Western Union Tel. Co. *v.* Hall, 124 U. S. 444.)

This claim was of the most speculative character. On the price of a bushel of wheat depends the price of a barrel of flour. The great wheat market, Chicago, daily demonstrates that the greatest prophet, whom men put faith in, could not possibly foretell the price of a bushel of wheat thirty days hence, so fluctuating is the grain market. Estimates of probable sales form no criterion of damages. (Olmstead *v.* Burke, 25 Illinois, 86. Winne *v.* Kelly, 34 Iowa, —.) The principles and ideas upon which the alleged damages are claimed cannot be reduced to a money standard. They do not form the subject of legal calculation in dollars and cents (Memphis *v.* Brown, 20 Wall. 289).

The rule for damages where machinery contracted for has been improperly constructed is to deduct from the contract price the cost of altering the construction of the machinery so as to make it conform to the contract (Stillwell & Bierce Mfg. Co. *v.* Phelps, 130 U. S. 520). "The plaintiff's agreement was not for a sale of the machinery subject to a condition that it should be satisfactory to the purchaser."

The agreement of the defendant in error, predicated on the condition precedent, stipulated by the plaintiffs in error, that if the plaintiffs in error would have the mill-house ready by June 1, 1885, the defendants in error would, by July 15, 1885, furnish machinery of a certain descrip-

tion and quality, and also to set it up and put it in complete operation in the mill, did not make the defendants in error bound as insurers that the plaintiffs in error should make and sell 200 barrels of flour a day for 60 days at a profit of $1.00 on each barrel.

It is scarcely possible that the damages claimed in the part of the plaintiffs-in-error plea, stricken out below, could have been in contemplation of either party at the time of the execution of the agreement (p. 6 of Record). In their pleas the plaintiffs in error nowhere allege that the agreement contains any contract, express or implied, by which defendants in error contracted to bear such exceptional losses as are claimed in the part of the plea stricken out by the court below.

The defendants in error, the company, might just as well claim the profits they might have made in their machine-manufacturing business, with the money which the plaintiffs in error owed them for the machinery put up. "A rule which is not reciprocal is scarce a just one." Here speculative profits on flour that was never made and never sold are claimed. All the authorities agree in excluding such claims. The vendees to whom the plaintiffs in error might have sold the flour, they might have made, might not have paid them ; they might have become insolvent. The wheat might have spoilt or been burnt up, and the insurance companies, with whom it may have been insured refused to pay the loss, or have become insolvent.

There is nothing in the agreement about the price of flour between July 15 and Sept. 15, 1885. During that period it might, for all the contracting parties knew to the contrary, have been $4.75 or $6.50 per barrel. The agreement was made without reference to the happening of any such unexpected events. In the present case it cannot be reasonably supposed that the company, the defendant in error, at the date of the agreement contemplated the pos-

sibility of these exceptional damages occurring to the plaintiffs in error. It does not even appear that at any time before August 26, 1885, the date at which defendants in error prove the mill was completed (see Odell's ans. to 9th int., p. 20), the plaintiffs in error notified defendants in error that they were losing then and had been losing $200 per day by the delay; nor that they had on hand the amount of wheat which, they allege, in the part of the plea stricken out, was on storage waiting to be ground, nor that they had intended from July 15 to Sept. 15, 1885, to work the mill up to its fullest capacity of 200 barrels a day, and would turn out 200 barrels per day for that period (2d Addison on Contracts, 675). There is nothing in the record to show that these special circumstances were known to defendants in error, or so communicated to defendants in error as to engraft a term into the agreement that the defendants in error should be liable for such special damages as plaintiffs in error claim (Willes, J., in British Columbia Saw-mill Co. *v.* Nettleship, Law R., 3 C. P. 508).

In Horne *v.* Midland Rwy. Co., in the Exchequer Chamber (Law Reporter, 8 C. P. 131) the court held that where a railway company had failed to deliver for the plaintiffs promptly a lot of shoes, shipped to plaintiffs' consignees, and in consequence of which delay plaintiffs had lost large profits which they might have made on the sale of the shoes, that plaintiffs were not entitled to such damages, the damage not being such as might reasonably be considered as arising naturally from the defendant's breach of contract, or such as might reasonably be supposed to have been in contemplation of both parties at the time when they made the contract.

In Sedgwick on Damages (marg. pp. 66 & 76) it is said in effect that if it be shown that the article was to be delivered for some *specific* object, known to both parties at

the time, and that thus a loss within the contemplation of both parties has been sustained, it may form an exception.

But in Horne *v.* Midland Railway Co. *supra*, Blackburn, J., in remarking on the dictum in Hadley *v.* Baxendale, says :

" In the case of Hadley *v.* Baxendale (9th Exch. 341) it was intimated that, apart from all questions of a special contract with regard to amount of damages, if there were a special notice of the circumstances, the plaintiff might recover the exceptional damages. This doctrine has been adverted to in several subsequent decisions with more or less assent, but they appear to have all been cases in which it was held that the doctrine did not apply because there was no special notice. It does not appear that there has been *any case* in which it has been affirmatively held that in consequence of such notice the plaintiff could recover exceptional damages. The counsel for the plaintiffs could not refer to any such case and I know of none."

Cases of this kind, claiming damages for profits that might have been made are likened by Willes, J., in British Columbia Saw-mill Co. *v.* Nettleship, L. R., 3 C. P. 508, to the old case " where a man going to be married to an heiress, his horse having cast a shoe on the journey, employed a blacksmith to replace it, who did the work so unskilfully that the horse was lamed, and the rider not arriving in time, the lady married another ; and the blacksmith was held liable to the loss of the marriage. The question is a very serious one ; and we should inevitably fall into a similar absurdity unless we applied the rules of common-sense to restrict the extent of liability for the breach of a contract of this sort."

We submit that there is no error in the record, and that the judgment of the court below should be affirmed.

JOHN JOHNS,

Of Counsel for Defendant in Error.

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OCTOBER TERM, 1890.

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W. J. [redacted] ET AL. vs. [redacted] AND J. BAKER.

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[No. 180.]

W. C. HOWARD, S. T. STRATTON AND J. RAUCH,
Plaintiffs in Error.

vs.

THE STILLWELL AND BIERCE MANUFACTURING COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Texas.

BRIEF OF DEFENDANT IN ERROR.

M. L. CRAWFORD,
Of Counsel.

John F. Worley, Stationer and Printer, Dallas, Texas.

W. C. HOWARD, S. T. STRATTON AND J. RAUCH, *Plaintiffs in Error*,

VS.

THE STILLWELL & BIERCE MANUFACTURING CO., *Defendant in Error.*

In Error to the Circuit Court of the United States for the Northern District of Texas.

Brief of M. L. CRAWFORD,
of Counsel for Defendant in Error.

March 23, 1885, defendants in error entered into a contract with plaintiff in error, by which plaintiff in error was to reconstruct the mill of defendants in error upon the roller system, and place in the mill certain machinery and appurtenances mentioned in the contract.

In payment for the work and material, defendants in error were to pay $17,850.00, as follows: $7,000 cash

on the shipment of the machinery; $7,000 in nine months, and $3,850 in twelve months from the date of the shipment of the machinery. For the deferred payments plaintiffs in error were to execute their promissory notes bearing eight per cent. interest, and to be dated as of the day of shipment.

By the terms of the contract plaintiffs in error were to build all stone or brick foundations for the machinery and frame all openings in the floors for packers, upright shafts, etc.

The contract contains the following stipulation :

"The party of the first part agrees to have the mill completed and ready to run on or before July 15th, 1885, provided the party of the second part shall have mill house ready by June 1st, 1885." By the terms of the contract the mill was to have a capacity of two hundred barrels of flour in twenty-four hours.

April 26, 1886, defendant in error instituted this suit, alleging that the machinery was shipped on or about June 1st, 1885, and that the contract had been fully complied with on its part, but that plaintiffs in error refused to pay the $7000 then due. January 31st, 1887, plaintiffs in error by leave of court filed its amended original petition, and alleged that the contract had been performed, that both the deferred payments were past due, that plaintiffs in error have refused to execute the notes for the deferred payments as provided for in the contract, and prayed for judgment for $10,850.00 the amount of the deferred payments with eight per cent. interest from May 26th, 1885, the date of the shipment of the machinery.

Plaintiffs in error answered admitting the execution of the contract and averring that they had the mill house ready on June 1st, 1885, for defendants in error to perform its part of the work, but that the mill was not completed until long after July 15th, 1885. That the work was not performed in a good or workmanlike manner; that they were compelled to purchase machinery mentioned in the answer, aggregating in value about $1450.00, and to rectify the mistakes in the construction of the mill they employed a millwright at $3.75 per day for ninety days; that they had purchased large quantities of wheat, etc.; that there was a cash market in Dallas for the grade of flour the mill would have made, had the same been completed according to contract, and that they could have sold all the flour they could have made, to-wit: 200 barrels per day at a profit of one dollar per barrel; that they were delayed sixty days in the manufacture of flour by reason of which they lost a profit of one dollar per barrel on 12,000 barrels, or the sum of $12,000, which, with the other items above mentioned, they plead in reconvention.

Defendants in error excepted to so much of the answer as sought to recover one dollar per barrel profit on 12,000 barrels of flour, which exception was sustained.

The jury returned a verdict in favor of defendant in error for $12,332.82, being the amount sued for, with 8 per cent. interest from May 26, 1885. And for plain-

tiffs in error for $875 damages. Upon this verdict the court rendered judgment in favor of defendant in error for $11,457.82.

The errors assigned are :

1. Overruling a motion to suppress the deposition of William Odell.

2. Sustaining exceptions to the plea in reconvention seeking to recover $12,000 profits which plaintiffs in error allege they could have realized on the sale of 12,000 barrels of flour.

3. The rejection of evidence in support of said plea.

The motion to suppress the deposition of Odell was as follows :

1. Because the deposition is not certified to by the officer who took the same as required by law regulating the taking of depositions *de bene esse.*

2. Because no reasonable notice of the time and place of taking said deposition was given the defendants as required by law regulating taking of depositions *de bene esse.*

3. Because said deposition was not taken under authority of any *dedimus potestatum* granted by any court of the United States according to common usage. (Fol. 26).

The witness, William Odell resided at Rochester, New York, and his deposition was taken under the regulations prescribed by the laws of Texas, and which have been adopted by the rules of the Circuit Court of the United States for this State.

Art. 2219 Revised Statutes of Texas is as follows: "The party wishing to take the deposition of a witness in a suit pending in court shall file with the Clerk or Justice of the Peace, as the case may be, a notice of his intention to apply for a commission to take the answers of the witness to interrogatories attached to such notice. The notice shall state the name and residence of the witness, or the place where he is to be found, and the suit in which the deposition is to be used, and a copy thereof and of the attached interrogatories shall be served upon the adverse party or his attorney of record five days before the issuance of a commission."

Art. 2224. "After the service of the notice of filing the interrogatories has been completed, the *clerk* or justice shall issue a commission to take the deposition of the witness named in the notice."

Art. 2226. "The commission shall be addressed to the following officers, either of whom may execute and return the same:

"2. If the witness be alleged to reside or be without the State and within the United States, to any clerk of a court of record having a seal, any Notary public, or any commissioner of deeds duly appointed under the laws of this State within some other state or territory."

The Northern District of Texas was created in 1879, prior to which time the territory composing this district was embraced in the western district of Texas. In 1872 Mr. Justice Bradley and Judge Thos. H. Duval, the then district judge of the western district of Texas, sitting together at Austin, adopted a rule numbered in their set of rules 15, which is as follows:

„15. Commissions to take examinations of witnesses and depositions and all testimony in a cause may be taken in the manner, and subject to the regulations so far as the same are applicable *mutatis mutandis* prescribed by the laws of the State of Texas."

In 1880, soon after the organization of the northern district the late Mr. Justice Woods and the Hon. A. P. McCormick, Judge of the northern district, adopted a set of rules one of which, rule 14, is identical in its language with rule 15 in the western district above set out.

In Warren vs. Younger, 18th Federal Reporter, 859, decided in January, 1884, the above rules are set out, and it is there held that they authorize the taking of depositions under the State law, and that such had been the settled practice of the court since the organization of the northern district of Texas.

The notice to take the depositions of the witness Odell, was as follows:

Stillman & Bierce M'fg Co.
vs.
W. C. Howard et al.
} No. 931.

To the defendants in the above entitled cause or to Messrs. Lindsley & McCormick, their attorneys of record.

Take notice that five days after the service hereof, we shall apply to the *clerk* of the United States Circuit Court, in and for the northern district of Texas, at Dallas, for a commission to take the answers of William Odell, who resides at the city of Rochester, in the

county of Monroe, in the State of New York, to the accompanying interrogatories. The answers of said witness will be read in evidence on behalf of the plaintiff upon the trial of this cause.

CRAWFORD & CRAWFORD,
Attorneys for Plaintiff.

(Fol 27).

Upon this notice and the accompanying interrogatories, the defendants in the court below made the following indorsement: "We waive copy of interrogatories and consent that commission may issue upon the original direct and cross interrogatories.

LINDSLEY & McCORMICK,
Attorneys for Defendants.

(Fol. 28).

Cross interrogatories were propounded to, and answered to by the witness.

In Flint vs. the Board of Commissioners of Crawford county, 5th Dillon, 481, a motion was filed to suppress depositions taken by the plaintiff in conformity to the provisions of the statutes of the State. The motion was based upon the failure of the notice and procedure to conform to the requirements of the Act of Congress, relating to the taking of testimony by deposition.

In overruling the motion, the late Justice Miller said: "In common law actions in the Federal courts where under the provisions of the act of Congress, a case arises in which testimony may be taken by deposi-

tion, the parties may follow in respect to the manner of taking them, either the provisions of the State law or of the act of Congress, as they may elect."

A change in the State law regulating the mode of taking depositions which has been followed for a long time, will be considered in the Federal courts as adopted by usage. The adoption of the State law only referred to the form and mode of taking depositions, and not to the circumstances under which they may be taken.

Curtis vs. Central Railway, 6 McLean, 403.

A deposition taken under a rule of court and sworn to before a Justice of the Peace, may be read. The provisions of the judiciary act refer to depositions taken without such rule.

Barnet vs. Day, 3 Wash. C. Ct., 243.

In Randall vs. Venable, 17th Federal Reporter, 162, Judge Turner, of the western district of Texas, decides that depositions taken under the State law can not be read in the Federal courts if objection be made, and that congress has not conferred upon the district and circuit courts the power to make rules touching the mode of taking testimony. At page 165, the judge says: "Uniformity in the mode and manner of taking evidence is desirable, and by proceeding under the act of Congress, this end is attained. On the other hand, the modes would be as different as the different State statutes upon the subject."

In Buddicum vs. Kirk, 3 Cranch, Sup. Ct., Chief Justice Marshall says: "By a subsequent part of the

section depositions may be taken by *dedimus potestatem* according to common usage. The laws of Virginia therefore, are to be referred to on the subject of notice."

If in taking a deposition under a *dedimus* or commission, according to common usage, the State law must be referred to for any purpose, it follows as matter of course that the common usage refers to the practice under the State laws, in so far as the mode of taking the deposition is concerned.

"The power to grant a *dedimus* to take the examination of a witness is given to this court in any case where it is necessary to prevent a failure or delay of justice by section 866 of the R. S. It is to issue according to common usage, which is construed to be the rule or law governing the practice of the court in this respect at the time. In this case, that law is found in sections 807 to 809 of the Oregon Civil Code. The mode of issuing the commission and the authority and directions to be contained in it, are prescribed by these sections, and it is to be executed accordingly. But the cases in which it may issue are not prescribed by the local law, but by the United States statutes. When it is necessary to grant a *dedimus* to prevent a failure or delay of justice, the court must determine either by a general rule or a special order in each case particular case."

Jones vs. Oregon Cen. R. R., 3 Sawyer, 528.

The same views are expressed by Judge McCormick in Warren vs. Younger, 18 Fed. Rep., 862.

Plaintiffs in error have waived all objections to the deposition of Odell which might have been taken in the beginning.

Since the organization of the northern district of Texas, it has been the practice to take depositions according to the State law, this practice being expressly authorized by a rule of the circuit court adopted soon after the organization of the district. The same practice had existed in the western district for many years before the northern district was created.

The right to take depositions under the State law had been expressly adjudicated by the judge before whom the case at bar was tried, years before notice of the taking of the deposition of Odell was served upon counsel for plaintiffs in error. The notice to take the deposition of this witness was in strict conformity to the provisions of section 2219, Revised Statutes of Texas. It states that application will be made to the clerk for a commission.

It will not do to impute ignorance to the counsel who represented W. C. Howard, et al. They knew the law, and the practice of the court as well, and with full knowledge of the fact that the deposition was to be taken under the local law, they file cross interrogatories and endorse upon the notice a waiver of a copy of the interrogatories and *consent* that commission may issue upon the original direct and cross interrogatories. (Fol. 28.) Both the direct and cross interrogatories were answered by the witness.

In Shutte vs. Thompson, 15th Wall., 152, the deposition of Underwood was not taken in conformity to the requirements of the judiciary act. In addition to this it was taken before a township justice, and not by any magistrate described in the act of Congress.

One of the counsel for the defendant had accepted notice for taking the deposition, and had appeared at the taking, and cross examined the witness. This, with other grounds constituted a waiver of objection to the deposition.

The want of an order for issuing a commission is waived by joining in executing the commission.

Rich vs. Lambert, 12 How., 354.
The Georgia, 7 Wall., 88.

The motion to suppress this deposition being based on the form and manner of taking, comes too late. The deposition was opened and filed January 22nd, 1887. (Fol. 16). The motion to suppress was not filed until after the trial commenced on the 8th. (Fol. 15.) The bill of exceptions recites, that in the trial of said cause, before the Hon. A. P. McCormick, judge, and a jury, the defendants moved the court the suppress the deposition of William Odell." (Fol. 26.) Art. 2235, Rev. Stat. of Texas, is as follows: "When a deposition shall have been filed in court, at least one entire day before the day on which the trial commences no objection to the form thereof or to the manner of taking the same, shall be heard, unless such objections are in writing and notice thereof is given to the opposite counsel before the trial of the suit commences."

The testimony of Odell was only cumulative. The bill of exception shows that "In rebuttal of defendant's case the plaintiff introduced other evidence besides the deposition of Odell, tending to prove that the con-

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tract was complied with on the part of plaintiff, and that the building was not completed by June 1st, 1885." (Fol. 32.)

The testimony of Odell does not prove or tend to prove the manner in which the mill was constructed. It simply proves that the mill was not ready for the machinery by June 1st, 1885, and excuses the delay in the completion of the work, which was to be finished by June 1st, provided the mill house was ready by July 15, 1885.

After that part of the answer which sought to recover the profits on 12,000 barrels of flour was stricken out, the only damages claimed were for machinery purchased, and wages paid a wheelwright to rectify the mistakes in construction. And it is manifested that as the pleadings then stood, the plaintiff could not have been prejudiced by any evidence which did not relate to the manner in which the mill was constructed.

Mining Co. vs. Taylor, 100 U. S., 37.
Lucas vs. Brooks, 18 Wall., 436.

So much of the plea in reconvention as sought to recover a profit of one dollar per barrel on 12,000 barrels of flour, was properly stricked out. The profits which they might have made upon the flour which they might have manufactured, was not the measure of damages for a breach of the contract.

That portion of the plea in reconvention stricken out by the court, was as follows: "There was a ready cash market in Dallas all the time for flour of the grade said mills would have made if constructed as plaintiff

had agreed it should be, and defendants could have sold all of this said flour it could have made during said unnecessary delays caused by plaintiff, viz., 200 barrels per day, and that plaintiff by reason of the facts above stated delayed defendants in the manufacture of said flour for sixty days, by which defendants lost a profit of one dollar per barrel on 12,000 barrels of flour, or the sum of $12,000. (Fol. 30).

The claim here is more extravagant than that in Griffin vs. Colver. That was a suit for the price of an engine, the defendant plead in reconvention, the damages sustained by them as a consequence of the delay in its delivery, and proved on the trial that the net average value of the engine at the time and place, and for the purpose intended was fifty dollars per day beyond the wear and tear of the machinery and the cost of running it. This result was obtained by calculating the wear and tear of the machinery, the cost of running it, and of the amount of lumber it would saw and plane in a day, together with the price which the defendants received for sawing and planing it. In disallowing the claim, the court says: "Nearly every element entering into such a computation, would have been of that uncertain character, which has uniformly prevented a recovery for speculative profits."

Griffin vs. Colver, 16 N. Y., 489.

Freeman vs. Clute, 3 Barb., 424.